Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

RICHARD REAHARD and ANN P. REAHARD.

Petitioners,

v.

LEE COUNTY, FLORIDA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Takings Clause of the Fifth Amendment includes the absolute requirement that the plaintiff in an action for just compensation retry his case in state court even though he had originally filed the lawsuit in state court and the case was removed by the government defendant to federal court?

2. Whether such a requirement violates the Fifth Amendment's guarantee that compensation be paid whenever private property is taken for public use?

3. Whether the second prong of the ripeness requirement announced in *Williamson County Regional Planning Commission v. Hamilton Bank* — which now leads to the filing of futile and duplicative lawsuits and bars plaintiffs from obtaining relief for the taking of their Fifth Amendment property rights — was modified by this Court's subsequent holdings in *First English Evangelical Lutheran Church v. County of Los Angeles* and *Lucas v. South Carolina Coastal Council*?

4. Whether this Court should provide badly-needed guidance to the lower courts which are new split on how to apply *Williamson County*?

PARTIES TO THE ACTION

All parties in the courts below are listed in the caption in this Court. Pursuant to Rule 29.1 of this Court, Petitioners have no parent companies nor any non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Richard Reahard and Ann P. Reahard hereby petition this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Eleventh Circuit or alternatively, for a summary reversal of the decision below.

OPINIONS AND ORDERS BELOW

1. The opinion of the United States Court of Appeals for the Eleventh Circuit, dated September 2, 1994 and published at 30 F.3d 1412 (11th Cir. 1994), is reproduced in Appendix A.

2. The decision of the magistrate judge on remand, dated April 22, 1993 but unpublished, is reproduced in Appendix B.

3. The addendum opinion of the United States Court of Appeals for the Eleventh Circuit to the magistrate judge, issued on December 8, 1992 and published at 978 F.2d 1212 (11th Cir. 1992), is reproduced in Appendix C.

4. The first decision of the United States Court of Appeals for the Eleventh Circuit vacating and remanding the magistrate judge's decision, rendered on August 14, 1992 and published at 968 F.2d 1131 (11th Cir. 1992), is reproduced in Appendix D.

5. The final judgment of the magistrate judge, issued on June 6, 1991 is unpublished, and is reproduced in Appendix E.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was issued on September 2, 1994. On December 1, 1994, Justice Kennedy extended the time for filing a petition for writ of certiorari to and including February 17, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that: "[N]or shall private property

be taken for public use, without just compensation." The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case is a classic example of how it can be virtually impossible for a property owner to vindicate his Fifth Amendment rights in court due to the endless procedural requirements facing him. It affords this Court an opportunity to provide badly needed guidance as to whether the requirement that a plaintiff first seek review of his taking claim in state court before filing in federal court — as set forth in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) — has been modified by this Court's more recent takings decisions. *Williamson County* places two ripeness hurdles in the way of a taking claim brought in federal court against states and their political subdivisions. The first requirement of *Williamson County*, that a claimant exhaust state administrative remedies before filing an action in federal court, was satisfied in this case.[1] The second, and independent, requirement of *Williamson County* dictates that plaintiffs "seek compensation through the [judicial] procedures the State has provided for doing so" before turning to the federal courts. *Id.* at 194.

Neither *Williamson County* nor have subsequent takings

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[1] The district court found as a fact that Lee County rendered a final administrative decision in this case on January 31, 1989. Order of the United States District Court, January 16, 1991. See Appendix E, *infra*. The court below rejected this factual finding without explanation in a *de novo* review. Petitioners believe that the court below's *de novo* review of this finding of fact was clear error.

decisions by this Court treated *Williamson County* as mandating a jurisdictional requirement. Indeed, in *Lucas v. South Carolina Coastal Council,* 505 U.S. ____, 112 S. Ct. 2886 (1992), this Court explicitly treated the ripeness requirement of (*Williamson County*) as a prudential concern:

> Lucas has properly alleged Article III injury-in-fact in this case, with respect to both the pre-1990 and post-1990 constraints placed on the use of his parcels by the Beachfront Management Act. That there is a discretionary "special permit" procedure by which he may regain — for the future, at least — beneficial use of his land goes only to the prudential "ripeness" of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here.

Id. at 2891-92 (citations omitted).

In sharp contrast with this Court's 1992 ripeness holding in *Lucas*, the court below failed to treat the second hurdle of the *Williamson County* ripeness requirement as a prudential matter — viewing it instead as an absolute jurisdictional bar, even though Petitioners did present Article III injury-in-fact and the case had already been tried twice before: "[U]ntil they have pursued their state remedy, the federal courts are without subject matter jurisdiction." *Reahard v. Lee County*, 30 F.3d 1412, 1418 (1994), reproduced in Appendix A, *infra*.

Had the court below treated the second prong of *Williamson County* as a prudential matter, it would have been required to defer to the trial court's factual determination that the case was sufficiently concrete for adjudication by the court, especially now that the case has been fully tried on two previous occasions (once before a jury) and reviewed twice on appeal.[2] Moreover, the court below ignored the fact that Petitioners originally filed this lawsuit in state court, and

were prevented from pursuing the case when Respondent removed the action to federal court in October of 1989 on the ground that the action involved a federal question arising under the Fifth Amendment to the United States Constitution and thus did not belong in state court. Likewise, at the time the lawsuit was filed, the State of Florida recognized no cause of action for inverse condemnation,[3] rendering his state action futile as well as impossible.

By failing to understand *Williamson County* in light of later decisions of this Court, the court below has joined many federal courts across the nation which continue to apply

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[2] The court below mandated in the first appeal that the trial court undertake an exhaustive review of the facts of this case looking specifically at:

1) the economic impact of the regulation on the claimant; . . . 2) the extent to which the regulation has interfered with his investment-backed expectations . . . . [3]) the history of the property — when was it purchased? How much land was purchased? Where was the land located? What was the nature of title? What was the composition of the land and how was it initially used?; [4]) the history of development — what was built on the property and by whom? How was it subdivided and to whom was it sold? What plats were filed? What roads were dedicated?; [5]) the history of zoning and regulation — how and when was the land classified? How was use proscribed? What changes in classifications occurred?; [6]) how did development change when the title passed; [7]) what is the present nature and extent of the property; [8]) what were the reasonable expectations of the landowner under state common law?; [9]) what were the reasonable expectations of the neighboring landowners under state common law?; and [10]) perhaps most importantly what was the diminution in the investment-backed expectations of the landowner if any, after passage of the regulation?

Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992), reproduced in Appendix D, *infra*.

[3] *See Lee County v. Morales*, 557 So.2d 652, 656 (Fla. Dist. Ct.App. 1990) ("A zoning change cannot give rise to a cause of action for inverse condemnation.").

Williamson County as if takings jurisprudence had not developed beyond the state of law in 1985. As discussed below, the holding in *Williamson County* has been interpreted inconsistently by federal courts as a jurisdictional, prudential and even a procedural requirement. Much of the inconsistency and confusion arises from the uncertainty at the time of the *Williamson County* decision surrounding the fundamental nature of a just compensation case. This Court has addressed many of these questions since 1985. Indeed, while it may now be fairly said that the *Williamson County* decision is inconsistent with this Court's subsequent holdings in important respects, some lower courts continue to apply *Williamson County* as if subsequent decisions had not answered many of the open questions. Thus, the time has come for this Court to reexamine *Williamson County* in light of subsequent holdings of this Court, including *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886 (1992), and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), all of which have fleshed out the elements of a Fifth Amendment cause of action.

For example, at the time of the *Williamson County* decision, this Court had not yet determined whether a cause of action for a temporary taking (for economic injuries suffered prior to judicial invalidation of the ordinance) was cognizable. In fact, the majority of the *Williamson County* Court appears to assume that a state need not provide such a monetary remedy so long as it allowed a cause of action to invalidate the unconstitutional state action: "The fact that a jurist as eminent as Oliver Wendell Holmes characterized a regulation that 'goes too far' as a 'taking' does not mean that such a regulation may never be canceled and must always give rise to a right to compensation." *Williamson County*, 473 U.S. at 203 (Stevens, J., concurring). Under this view, a requirement

that the plaintiff first litigate the validity of the ordinance or statute in state court before he could claim just compensation under the Fifth Amendment may appear logical and even prudent. Under this "California rule" (subsequently rejected in *First English*)[4], the plaintiff could litigate only the validity of the ordinance and had no right to demand that the state involuntarily condemn his property and pay money damages; likewise, temporary takings were not recognized and payment for such damages was not required. This view can no longer be sustained in light of *First English*.

First English also established the principle that temporary takings are compensable, an issue open at the time of the *Williamson County* decision. *First English*, 482 U.S. at 319. Moreover, the *First English* Court specifically found that the cause of action arose at the time the ordinance was passed and that compensation was due for the period between that passage and the date on which the offending ordinance was invalidated or repealed: "These cases reflect the fact that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compen-

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[4] As Justice Stevens said in his dissent in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), highlighting the conflict between *First English* and *Williamson County*:

> In short, even if the California courts adhere to a rule of never granting monetary relief for a temporary regulatory taking, I believe we should require the property owner to exhaust his state remedies before confronting the question whether the net result of the state proceedings has amounted to a temporary taking of property without just compensation. In this case, the Church should be required to pursue an action demanding invalidation of the ordinance prior to seeking this Court's review of California's procedures.

First English, 482 U.S. at 338 (Stevens, J., dissenting).

sation." *Id.* at 318. *First English* thus made clear that the plaintiff had a case for compensation under the Fifth Amendment at the time the ordinance was passed, in addition to the state court remedy for invalidation cited in *Williamson County* as the reason for requiring suit in state court (the second prong of the ripeness requirement). *See also Lucas v. South Carolina Coastal Council,* 505 U.S. __112 S. Ct. at 2901 ("When, however, a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.").

Similarly, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court found that a cause of action under the Fifth Amendment's Takings Clause arises at the time a permit condition becomes final where there is no nexus between the condition and the stated governmental purpose.[5] This Court clarified the rule this past term, in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), by requiring that the burden imposed be roughly proportional to the public burdens created by the proposed use of the property. In none of these cases did this Court suggest that the Fifth Amendment cause of action did not arise until after the plaintiff had litigated his claims under state law in order to demonstrate that he had, in fact, suffered injury.

As this Court has held on numerous occasions, the obligation for just compensation attaches whenever government action works a taking of private property rights. *Armstrong v. United States,* 364 U.S. 40, 49 (1960). This constitutional obligation is so evident that this Court has held that an aggrieved property owner need not look to a statute or other legislative authorization in order to obtain the remedy of just compensation to which he is entitled. *First English* , 482

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[5] It should be noted that although not raised as a legal issue, no such nexus was present in this case.

U.S. 304 (1987); *United States v. Clarke*, 445 U.S. 253, 257 (1980).

In short, subsequent decisions of this Court have determined that the Fifth Amendment cause of action arises at the time the administrative decision becomes final as a matter of fact. Nothing in those decisions suggests that the cause of action is incomplete until after the plaintiff had litigated his case in state court, nor do they stand for the proposition that a plaintiff whose state court case is removed to federal court is thereby defeated because the federal court lacks jurisdiction. Although *Williamson County* may have been a good guess at what was to come in Fifth Amendment jurisprudence in 1985, subsequent decisions of this Court require that *Williamson County* be revisited in light of current Fifth Amendment jurisprudence. Accordingly, Petitioners urge this Court to grant this Petition for review and declare that their case — which was removed by the Respondent to the federal court for resolution and which has now been tried twice — has satisfied the prudential concerns of the state exhaustion ripeness requirement set forth by this Court in *Williamson County*, or, alternatively, to reverse summarily the opinion below as inconsistent with this Court's subsequent holdings in *First English* and *Lucas*.

FACTUAL BACKGROUND

Petitioners, Richard and Ann Reahard, own approximately forty acres of land located in Lee County, Florida. From the advent of zoning in 1962, until December 1984, the property was zoned for a single family home subdivision with an allowable density of up to 126 homes. All of the land surrounding Petitioners' property had already been developed into single family residences.

In December 1984, Lee County re-zoned the forty acres as a "resource protection area," limiting development on the

property to only one house and designating the remainder of the land as "recreational, open-space or conservation" use. The Reahards' property is the only land in Lee County so designated.

Between 1984 and 1989, the Reahards exhausted every available option for obtaining administrative relief from this draconian classification, finally filing suit as a last resort. Now, after ten years — during which they obtained two favorable judgments in federal district court — the Reahards face having to go back to square one and start all over again in state court.

PROCEEDINGS BELOW

Prior to filing this suit, the Reahards pursued all available administrative remedies. The Reahards filed an Application for an Administrative Determination of Error, a Request for Plan Amendment, and an Application for Determination of Minimum Use. During the administrative process, the Reahards filed a site development plan aiming to develop thirty-five of the forty acres contained in the parcel. The Lee County Commission rejected the Reahard application, despite the positive recommendation of the County Planning and Zoning Commission. The Reahards also sought an administrative interpretation of their development rights pursuant to the Lee Plan, which requires that "interpretations which would be confiscatory, arbitrary, capricious, unreasonable, or which would deny all economically viable use of property shall be avoided. Lee Plan, Admin. Interp. Chapter XIV-6B(1). In July 1990, the Lee County Attorney's Office determined that the Reahards could construct four homes on the lot. The Reahards appealed, but the Board of Commissioners upheld the administrative determination, but modified it to allow only one home on the lot.

On September 1, 1989, the Reahards filed a complaint in

the Twentieth Judicial Circuit Court of the State of Florida, alleging that application of the Lee County Comprehensive Land Use Plan constituted a taking of his property under the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, and requested just compensation for the taking. Petitioners conceded that the Lee Plan was a valid exercise of the police power of Lee County. On October 4, 1989, Lee County responded by removing the case from state court to United States District Court for the Middle District of Florida.

The case was heard by a magistrate judge, and issues of damages and liability were bifurcated. On January 16, 1991, the judge found that the claim was not barred by the statute of limitations, that the Reahards had exhausted all of the administrative remedies and that the claim was ripe for adjudication. The magistrate judge found that Lee County took the Reahards' land when it passed the Lee Plan because the plan deprived the Reahards of substantially all of the value of their property.

Lee County appealed this decision to the United States Court of Appeals for the Eleventh Circuit; the Eleventh Circuit dismissed the appeal because there had been no decision on damages yet. The jury trial on damages ended with a verdict for the Reahards on May 21, 1991 for $700,000 and 6.07% interest accrued from December 21, 1984. This sum represented a determination that the Lee Plan caused a ninety-six percent reduction in value in the Reahards' property. Appellee's Brief to the United States Court of Appeals for the Eleventh Circuit, at 3. The final judgment, issued June 6, 1991, was amended to award interest at twelve percent, and require the Reahards to execute and deliver a fee simple deed to Lee County.

Lee County again appealed to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit issued an order that it would wait for the Supreme Court

opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886 (1992). In its decision, the Eleventh Circuit noted that the question presented in *Reahard v. Lee County* was not answered in *Lucas*. *See Reahard v. Lee County*, 968 F.2d 1131, 1134, n.5 (11th Cir. 1992), reproduced at Appendix D, *infra* ("Although we awaited the release of *Lucas*, the Court left open how the categorical takings rule set forth in its opinion applies to situations in which a part of a landowner's property is rendered unusable by a regulation."). On the second appeal, the Eleventh Circuit Court of Appeals remanded, suggesting that there may be ample evidence to support the decision but finding that the order misapplied the law on partial takings and failed to make adequate factual findings on which to base a decision. The remand occurred on August 14, 1992. On December 8, 1991, the Court of Appeals *sua sponte* issued an addendum opinion requesting the magistrate judge to consider the ripeness issue again to ensure that the court had jurisdiction. *Reahard v. Lee County*, 978 F.2d 1212 (11th Cir. 1992), reproduced at Appendix C, *infra*.

Pursuant to the direction of the appellate court, the trial court carefully reviewd the evidence and made detailed factual findings that were applied to the standards XX in the remand decision. The magistrate judge found that the case was ripe because the Reahards had exhausted all administrative remedies and because no state remedy existed at the time the Reahards filed suit and reinstated the jury verdict of $700,000. The court cited *Lee County v. Morales*, 557 So.2d 652, 656 (Fla. Dist. Ct. App. 1990) which held that no inverse condemnation remedy existed for a landowner aggrieved by zoning changes. Again, Lee County appealed to the United States Court of Appeals for the Eleventh Circuit, which held that the case was not ripe for review, and that the trial court had no subject matter jurisdiction over the claim. Therefore, the Eleventh Circuit reversed the district court

decision and remanded the cause to the state court from which it was removed by the defendant in 1989.

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT — WHETHER THE TAKINGS CLAUSE INCLUDES THE ABSOLUTE REQUIREMENT THAT THE PLAINTIFF IN AN ACTION FOR JUST COMPENSATION FIRST FILE SUIT IN STATE COURT EVEN WHERE IT IS CLEAR THAT THE HAD NO REMEDY UNDER STATE LAW?

In *Williamson County*, this Court decided that a claim brought to invalidate a local zoning decision brought under 42 U.S.C. § 1983 was not "ripe" for federal court review because (1) the property owner had not obtained a "final decision" from the administrative agency and (2) the property owner had not first filed in state court to challenge the denial of the permit. *Williamson County,* 473 U.S. at 186. The policy underlying this Court's opinion was that federal courts should not intervene in reviewing a local zoning decision "until a final decision is made as to how the regulations will be applied to respondent's property." *Id.* at 200. Accordingly, this Court held that the case was not ripe for review because "we held that we could not review a taking claim as long as the property owner had an opportunity to obtain a variance or some other form of relief from the zoning authorities that would permit the development of the property to go forward." *First English,* 482 U.S. at 333 (Stevens, J., dissenting). Additionally, this Court was concerned about "evaluat[ing] [a] taking claim when the long term economic effects were uncertain because it was not clear that restrictions would remain in effect permanently." *Id.* at 331, *citing*

Williamson County, 473 U.S. at 190-91.

The court below has extended the holding of *Williamson County* to bar absolutely Petitioners from prosecuting a Fifth Amendment claim for just compensation unless the state claims have first been litigated in state court:

> As we have noted above, the Lee County Board of Commissioners decision issued on September 19, 1990 fulfilled the "final decision" requirement of *Williamson*. Several months earlier, however, the Florida Supreme Court recognized an inverse condemnation remedy. Thus, by the time that the "final decision" obstacle was removed from the path of the Reahards' federal claim, a second obstacle to that claim had been erected in the form of a newly-recognized state remedy for inverse condemnation. The Reahards' claim therefore never has become ripe while on the federal court docket; until they have pursued their state remedy, the federal courts are without subject matter jurisdiction.

Reahard v. Lee County, 30 F.3d at 1417-18 (citations omitted), reproduced at Appendix A, *infra*.

Yet this Court has never held, much less suggested, that the Takings Clause includes a requirement that a claim for just compensation, which satisfies Article III "case or controversy" and causes injury-in-fact, is to be dismissed from federal court as "unripe" — after having been tried twice and reviewed by the court below twice — simply because the plaintiff was prevented from filing a futile lawsuit in state court.

A. THE LOWER COURT'S DECISION CONFLICTS WITH PRECEDENT SET BY THIS COURT IN *FIRST*

ENGLISH AND *LUCAS*, AND OTHER DECISIONS OF THIS COURT REGARDING RIPENESS.

The *Williamson County* Court stated that the second prong of its ripeness requirement was based on the Takings Clause itself: "The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Williamson County*, 473 U.S. at 195, n.13.

Yet, when *Williamson County* was decided in 1985, there were many open issues in takings law. Chief among these were the questions (1) whether a temporary taking was compensable under the Fifth Amendment and (2) whether invalidation was the only remedy for a regulatory taking. Thus, the requirement that a plaintiff first litigate his case in state court before filing it in federal court reflected, in part, these uncertainties in the law. In 1987, however, this Court answered both of these questions making clear that the plaintiff had a case for just compensation under the Fifth Amendment at the time the ordinance was passed in addition to the state court remedy for invalidation. *First English*, 482 U.S. 304 (1987).

Moreover, the decision below, which would bar the door of the federal courthouse for plaintiffs seeking compensation under the Fifth and Fourteenth Amendments, is based on a draconian theory of ripeness not countenanced in any other area of law. In the landmark case of *Abbott Labs v. Gardner*, 387 U.S. 136 (1967), this Court explained that the purpose of the ripeness doctrine

> is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in

a concrete way by the challenging parties.

Id. at 148-49.

The *Abbott Labs* Court added: "The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* Thus, the ripeness doctrine has not generally been treated by this Court as a jurisdictional or strict procedural and mechanistic requirement mandating the trial and retrial of issues in multiple courts as a prelude to vindicating constitutionally-protected rights. Professor Marla E. Mansfield states, quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 156 (1951) (Frankfurter, J., concurring):

> Justice Frankfurter's concurrence is telling. Despite his many opinions closing the courthouse door, he emphasized that '[f]inality is not . . . a principle inflexibly applied.' Crucial elements to consider include the probability that the plaintiff will be impacted and the burden created by procedures that exist for challenging the ultimate action.

Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. L. Rev. 1, 21-22 (1992).

The *Abbott Labs* ripeness doctrine is reflected in the recent decision of *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S. Ct. 2886 (1992). In *Lucas*, this Court explained why it rejected the *Williamson County* argument pressed by government counsel that the case be remanded to state court for another hearing to determine if the court below would alter its ruling in light of the recent amendments to the

Beachfront Management Act. Those amendments specifically set up a variance process that would, if applied to the petitioner in that action, require him to start all over again by submitting a variance to the state. This Court rejected that argument, however, and concluded that the case as it was then presented to the Court was ripe for review and that "neither 'prudence' nor any other principle of judicial restraint requires that we remand . . ." *Id.* at 2892, n.5.

Thus, contrary to this Court's treatment of ripeness in *Lucas*, which is consistent with this Court's other rulings on ripeness, the decision below sets a dangerous and far-reaching precedent that sanctions the whipsawing of Fifth Amendment plaintiffs from court to court, requiring that both public and private resources be wasted on futile and pointless litigation in order to "ripen" the case for federal court review. This turns the whole purpose behind the ripeness doctrine on its head. *See, e.g., Taylor Inv., Ltd. v. Upper Darby Township,* 983 F.2d 1285, 1289-90 (3d Cir.), *cert. denied*, 114 S. Ct. 304 (1993) (recognized that the ripeness doctrine is grounded in both prudential considerations and the case or controversy requirement). *See also Eide v. Sarasota County,* 908 F.2d 716, 720-24 (11th Cir. 1991).

That the ripeness standard sanctioned by the court below disregards the prudential concerns of the ripeness doctrine, and instead leads to gamesmanship and protracted litigation has not escaped the notice of other federal judges. In *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 882 F.2d 1398 (9th Cir. 1989), the Ninth Circuit Court of Appeals dismissed a lawsuit from federal court as unripe under *Williamson County* after six years of litigation because the property owner had not first prosecuted his case in state court. Expressing dismay over the use of *Williamson County* as a delay tactic by the governmental defendant, Judge Alex Kozinski, writing for the *Sinaloa* court, observed: "Plaintiffs filed this lawsuit in December 1983, yet it was not until May 1986, one month

before trial was to begin, that defendants first raised a ripeness challenge. It is clear they knew from the beginning that plaintiffs had not exhausted their state compensation remedies." *Id.* at 1403, n.3. The court there concluded that an appropriate solution to avoid any further delay resulted from the need to comply with *Williamson County* was to allow the plaintiff to amend its federal complaint on remand to include a pendent state law takings claim. The federal district judge could then ascertain whether the state would afford the plaintiff just compensation as a pendant state claim. *Id.* at 1404, n.4.

Other federal judges have allowed plaintiffs to plead their claims as something other than a takings claim so as to avoid the technical trap which *Williamson County* has now become. For example, a federal judge in Colorado recently refused to dismiss a lawsuit, concluding that the second prong of *Williamson County* did not bar property owners from going forward with their claim for money damages because the plaintiffs had alleged a "conspiracy" to take their property, not the actual "taking" of their property. *Oberndorf v. City of Denver,* 653 F. Supp. 304 (D. Colo. 1986). The judge noted that "if plaintiffs seek just compensation through inverse condemnation proceedings, then the objective, which defendants' conspiracy was designed to achieve, would be realized." *Id.* at 308. The *Oberndorf* court continued:

> This last point is key. If plaintiffs now execute their state court remedy, as defendants suggest, then they would be playing right into the scheme defendants have allegedly constructed. There are no further steps available to plaintiffs which might relieve them of the burdens created by the Urban Renewal Plan.

Id.

Likewise, requiring Petitioners to start all over again by forcing them to file their lawsuit in state court plays right into the governmental defendant's gamesmanship. The Petitioners did originally file their lawsuit in the Twentieth Judicial Circuit Court of Florida in September of 1989. After that, the Respondent voluntarily and intentionally removed the case from state to federal court, asserting that a federal question existed — *i.e.*, whether a Fifth Amendment taking requiring just compensation had occurred. It was not until after the case had been tried twice and appealed twice that the governmental defendants asserted that the case should have been tried first in state court.

The court below has never explained why the Petitioners' initial filing of their lawsuit in state court did not satisfy the second prong of *Williamson County*. By holding the case as not ripe at this time, the court below not only encourages further gamesmanship by governmental defendants in other cases but eradicates the results of two trials on the merits in this case[6] (one before a jury) and two appeals, spanning five years of litigation. Now, ten years after passage of the ordinance in question, Petitioners face the prospect of beginning the process all over again by attempting to file in state court a second time (facing the additional hurdles imposed by the statutes of limitations and the passage of time).

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[6] The trial court found that the Reahards had exhausted their administrative remedies and that the Lee Plan had destroyed their investment-backed expectations to such an extent as to constitute a taking.

B. THIS IS AN ISSUE OF CRITICAL IMPORTANCE TO FIFTH AMENDMENT PLAINTIFFS BECAUSE A RIGID APPLICATION OF *WILLIAMSON COUNTY* NOW BARS COUNTLESS PROPERTY OWNERS FROM VINDICATING THEIR CONSTITUTIONAL RIGHTS TO JUST COMPENSATION IN FEDERAL COURT.

An even more perverse result occurs when the *Williamson County* ripeness doctrine combines with *res judicata* principles, barring a plaintiff from "relitigating" the takings claim which he filed in state court in obedience to the second ripeness hurdle. Under this "catch-22", a plaintiff *must* first file in state court (*Williamson County*) and, having litigated his claim to judgment, will be dismissed from federal court precisely *because* he did so. Thus, a plaintiff may be barred from bringing his constitutional claim to federal court — either because he has not yet litigated it in state court first, or because he has done so. *See generally* Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, *in* Institute on Planning, Zoning, and Eminent Domain § 7 (Matthew Bender 1991) and Douglas W. Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 Zoning & Planning Law Report 57 (1990). For example, in *Palomar Mobilehome Park Ass'n v. City of San Marcos,* 989 F.2d 362 (9th Cir. 1993), a property owner filed suit in state court to challenge a mobile home rent control ordinance as an unconstitutional taking. He lost. The plaintiffs then filed in federal court, where the case was dismissed on the grounds of *res judicata:*

> Palomar's first argument, that its takings claim cannot be barred because it was not ripe until the state court ruled on its claim, lacks merit. Palomar correctly interprets *Williamson County*, to require that

> a plaintiff take its takings claim to state court before the case will be ripe for federal adjudication. However, this requirement does not prevent the doctrine of *res judicata* from barring subsequent federal action. . . . "Appellants have exhausted their state claims, which, under *Williamson*, is a necessary predicate to their federal cause of action; but in doing so, they received a full and fair adjudication of their constitutional claims against the City in state court. Due process guarantees them no less, but entitles them to no more." . . . We are compelled to conclude that *res judicata* bars Palomar's claims in federal court, despite the requirements of *Williamson*.

Id. at 364-65 (citations omitted), *quoting Peduto v. City of North Wildwood*, 878 F.2d 725, 729 (3d Cir. 1989) (subsequent federal claim for just compensation was also barred by the doctrine of *res judicata*). *Accord Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359 (9th Cir. 1993).

In *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992) the neighbors of the Tampa Airport sought compensation in state court for the taking of noise and avigation easements over their properties. They restricted their state lawsuit to Florida law, and raised no claims under the federal constitution. Having lost their suit at the state level, they filed their lawsuit in federal court, raising their federal claims. The case was dismissed as being barred by *res judicata* and collateral estoppel. The *Fields* court correctly framed the issue which must be resolved by this Court:

> This case presents a jurisdictional problem created by the interplay between 28 U.S.C.A. § 1738 and the Supreme Court's holding in *Williamson County*. On the one hand, *Williamson County* requires po-

> tential federal court plaintiffs to pursue any available state court remedies that might lead to just compensation before bringing suit in federal court under section 1983 for claims arising under the Fourteenth and Fifth Amendments for the taking of property without just compensation. On the other hand, if a litigant brings a takings claim under the relevant state procedure, he runs the risk of being barred from returning to federal court; most state courts recognize *res judicata* and collateral estoppel doctrines that would require a state court litigant to raise his federal law claims with the state claims, on pain of merger and bar of such federal claims in any attempted future proceeding.

Id. at 1302-03 (citations omitted). *Cf. New Port Largo, Inc., v. Monroe County,* 985 F.2d 1488 (11th Cir. 1993) (case was not time-barred because it was premature to file in federal court until state litigation was complete).

Thus, a broad application of the second prong of the *Williamson County* ripeness requirement is not only a time-wasting hurdle for the courts and litigants, but may, in fact, bar altogether federal court adjudication of their Fifth Amendment claim for just compensation. While *Williamson County* may have been originally intended to require the litigation of state issues in state court, leaving the federal forum available in those instances where the state failed to provide compensation for a violation of the takings clause, the ripeness requirement was never intended to bar altogether Fifth Amendment litigants from federal court. Indeed, it would be anomalous to suggest that a right guaranteed by the United States Constitution could not be litigated in federal court. *See Jacobs v. United States*, 290 U.S. 13 (1933) (inverse condemnation suit rests on the Fifth Amendment and

is therefore based on the Constitution).

In order to avoid such a result, some circuits have interpreted *Williamson County* narrowly, holding that it only applies in claims for just compensation. *See, e.g., Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991) (aggrieved landowner asserted deprivation of procedural due process so his action was ripe even though he did not exhaust administrative remedies).

C. THERE IS A SERIOUS SPLIT AMONG THE CIRCUITS AS TO WHETHER *WILLIAMSON COUNTY* BARS FEDERAL COURT ACCESS FOR A CASE BROUGHT DIRECTLY UNDER THE FIFTH AMENDMENT.

Petitioners brought their claim for just compensation directly under the Fifth and Fourteenth Amendments to the United States Constitution. Because Petitioners have a claim under the Constitution, they need not look to any statute — such as 42 U.S.C. § 1983 — to state a claim for relief in federal court.[7] Federal courts have subject matter jurisdiction

[7] The Solicitor General urges that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity establishes that the Amendment itself is only a limitation on the power of the government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.' Brief for United States as Amicus Curiae 14. Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking. *See San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 655, n.21 (1981) (Brennan, J., dissenting), *quoting United States v. Dickinson*, 331 U.S. 745, 748 (1947).
First English, 315 U.S. at 316, n.9.

for actions brought directly under the Fifth and Fourteenth Amendments pursuant to 28 U.S.C. § 1331. The court below's conclusion that it lacked "subject matter" jurisidiction over the Petitioners' claim is extraordinary, particularly since this Court so recently that a cause of action for a violation of the Fifth Amendment arises at the time the governmental act destroys or infringes upon private property rights. *First English,* 315 U.S. at 320, n.10.

Unlike the Petitioners' action which is founded on the Fifth Amendment, the claim barred as unripe for federal court review in *Williamson County* was a takings claim brought pursuant to Section 1983. The *Williamson County* Court held that the *Parratt* doctrine — an exception to the normal rule that plaintiffs need not exhaust administrative remedies before bringing a Section 1983 action — barred the Petitioners' claim for just compensation because the state had not yet fully determined that compensation would not be paid to the property owner. *Williamson County*, 437 U.S. at 195. *See Parratt v. Taylor*, 451 U.S. 527 (1981) (plaintiff's Section 1983 action deemed not ripe because the state provided a post-deprivation process for the alleged denial of due process).

Prior to *Williamson County,* lower courts followed this Court's rule in *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), which held that there is no requirement that a plaintiff exhaust administrative remedies before bringing a Section 1983 action. Since *Williamson County* was decided, lower courts have been split as to whether *Williamson County* applies only to takings cases brought under Section 1983, whether it applies broadly to takings claims brought directly under the Fifth Amendment, and even whether *Williamson County* applies to claims beyond the Fifth Amendment. The court below applied *Williamson County* broadly, to bar the Reahards' Fifth Amendment takings claim. *Compare Nasierowski Bros.*, 949 F.2d at 894 ("a procedural due pro-

cess claim is instantly cognizable in federal court ") *with Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269 (8th Cir. 1994) (applying *Williamson County* to non-taking claim involving zoning).

The better interpretation of *Williamson County* is reflected in the Sixth Circuit's recent decision in *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354 (6th Cir. 1992), in which the court held the filing of an equal protection action (challenging a zoning action) in federal court was ripe because:

> We believe that finality, not the requirement of exhaustion of remedies, is the appropriate determinant of when litigation may begin. By finality we mean that the actions of the city were such that further administrative action by Bannum would not be productive. This test, of course, can be met by the exhaustion of remedies. It can also be met by other evidence and can be satisfied prior to compliance with all the required procedures. This analysis suggests that *Williamson* does not require a finding of lack of finality in this case.

Id. at 1362-63.

Just last term this Court made plain that "the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should [not] be relegated to the status of a poor relation in these comparable circumstances." *Dolan v. City of Tigard,* 114 S. Ct. 2309, 1994 U.S. LEXIS 4826, *31 (1994). This Court has also made clear that the protection of private property is essential to maintaining all other civil rights protected by the Constitution. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Yet lower courts cannot provide the vigorous protection to private property rights envisioned by the founding fathers if their ability to hear takings claims is precluded by a rigid jurisdictional standard.

Indeed, the ripeness standard applied by some lower courts in Fifth Amendment cases is unlike that faced by plaintiffs in any other area of constitutional law. *See, e.g., Kelly v. Nordberg*, 1993 U.S. App. LEXIS 20719 (1st. Cir. Aug. 17, 1993) (upholding right of plaintiff to file action alleging unconstitutional infringement of right to travel directly in federal court). The ripeness standard adopted by the court below would not survive constitutional scrutiny were it applied to bar federal court review of an equal protection, First Amendment or other constitutional cause of action. Fifth Amendment plaintiffs are a notable exception to the general rule that exhaustion of state remedies is not necessary before federal courts can hear a case.[8] *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992) (challenge to Pennsylvania abortion statute on due process grounds ripe when first brought in federal court); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990) (challenge to zoning ordinance restricting adult businesses on First Amendment grounds ripe when brought first in federal court); *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989) (commerce clause challenge to Connecticut statute requiring out of state beer shippers to affirm that products sold to Connecticut dealers be priced no higher than in neighboring states considered ripe when first brought in federal court); *Kentucky Dep't of Corrections v. Thompson*,

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[8] In cases involving a writ of habeas corpus, prisoners are required to exhaust their state remedies before they can bring suit in federal court, in large part because this is required by the habeas corpus statute. 28 U.S.C. § 2254. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), state prisoners sued in federal court under both § 1983 and the habeas corpus statute because their good-time credits were cancelled after disciplinary problems. The Court held that their case was not ripe, even though there was no state exhaustion requirement in § 1983, noting considerations of federal-state comity, respect for state functions, and the habeas corpus exhaustion requirement.

490 U.S. 454 (1989) (suspension of visitation rights for inmates in Kentucky prisons without hearing challenged on Fourteenth Amendment Due Process grounds, and ripe when first brought in federal court); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (challenge to airport restriction on handing out literature on First Amendment grounds ripe when brought first in federal court); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (challenge to city zoning ordinance requiring special use permit for group home for mentally retarded on Equal Protection grounds ripe when first brought in federal court). Indeed, even in actions brought under Section 1983, courts have not uniformly required plaintiffs to exhaust their state court remedies when constitutional rights — other than Fifth Amendment rights — are at stake.

For example, in *National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984), plaintiffs who challenged a state statute that provided for dismissal or suspension of teachers who engaged in public homosexual conduct on the ground that it violated the Fourteenth Amendment were allowed to file their action directly in federal court. They were not required to file first in state court to ascertain whether the state would afford them a remedy. *See also Barry v. Barachi*, 443 U.S. 55 (1979). In *Railroad and Warehouse Commission of Minnesota v. Duluth Street Railway Co.*, 273 U.S. 625 (1927), plaintiffs brought an action under the Fourteenth Amendment alleging that the passenger rates set by the defendant were confiscatory. This Court held that requiring plaintiffs to exhaust state remedies is not a "fundamental principle of substantive law but [is] merely a requirement of convenience or comity." *Id.* at 628. As the *Duluth Street Railway* Court further explained:

> Where as here a constitutional law right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired

> result by an appeal to the State Court when at least it is possible that as we have said it would find itself too late if afterwards went to the District Court of the United States.

Id.

In *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975), the court held that "[t]he exhaustion doctrine is not inflexible and when the reasons supporting the doctrine are found inapplicable, the doctrine should not be blindly applied." *Id.* at 474. Accordingly, the court held that the plaintiff could pursue his Fourth Amendment cause of action in federal court without exhausting his military court remedies.

Nor has this Court rigidly required state court exhaustion under the First Amendment. In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), a group of professors attacked a state university requirement that they sign a statement that they were not communists. Failure to sign the statement would lead to dismissal. The plaintiffs would not sign the statement, and sued directly in federal court. There was no mention of the issue of state exhaustion. *See also Lasco v. Koch*, 428 F. Supp. 468 (S.D. Ill. 1977) (state civil service employee brought a Section 1983 action in federal court on the grounds that he had been unlawfully discharged for exercising his First Amendment rights not required to exhaust state remedies).

Finally, this Court has also rejected the notion that a plaintiff must always first file in state court before seeking relief in federal court for an alleged violation of the Fifteenth Amendment. *Lane v. Wilson*, 307 U.S. 268 (1939). In *Lane*, the plaintiff had sued for damages resulting from discriminatory treatment arising out of voter registration requirements intended to prevent blacks from voting. The state argued that

the plaintiff must first use established state procedures for determining claims of discrimination. This Court, however, rejected that argument stating: "Barring only exceptional circumstances, or explicit statutory requirements, resort to a federal court may be had without first exhausting the judicial remedies of state courts." *Id.* at 274 (citations omitted).

CONCLUSION

In order for lower courts to ensure that the Fifth Amendment claims for just compensation are vindicated, it is critical that the issue of whether ripeness is an absolute jurisdictional bar, or is instead a doctrine with prudential considerations to be resolved by this Court. Otherwise, and without this Court's intervention, the Fifth Amendment will remain the "poor relation" of other constitutional rights.

Accorcdingly, the Petitioners hereby urge this Court to grant this Petition for Writ of Certiorari to review the decision of the court below, or alternatively, to reverse summarily the decision below.

Respectfully submitted,

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February 16, 1995

APPENDIX A

Richard Reahard; Ann P. Reahard, Plaintiffs-Appellees, v. Lee County, Defendant-Appellant.

REAHARD v. LEE COUNTY

No. 93-2743.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

30 F.3d 1412; 1994 U.S. App. LEXIS 23881;
8 Fla. Law W. Fed.
C 573

September 2, 1994, Decided

SUBSEQUENT HISTORY: [**1] As Amended.

PRIOR HISTORY: Appeal from the United States District Court for the Middle District of Florida. (No. 89-227-Civ-FTM-10C). George T. Swartz, Magistrate.

DISPOSITION: Reversed and Remanded.

COUNSEL: For Defendant-Appellant: JOHN JOSEPH RENNER, Lee County Attorney's Office, Meyers, FL. For Defendant-Appellant: BRUCE R. CONROY, City Attorney's Office, Cape Coral, FL. ROBERT N. REYNOLDS, Winter Park, Florida.

For Plaintiff-Appellee: THEODORE L. TRIPP, JR., Garvin

& Tripp, Ft. Myers, Florida. For FL Dairy Farmers, etc, Plaintiffs-Appellees: MARTY SMITH, Simmons & Hart, Ocala, FL. For Southeastern Legal Foundation, Plaintiffs-Appellees: G. STEPHEN PARKER, Atlanta, GA. For Plaintiffs-Appellees: Robert M. Rhodes, STEEL HECTOR & DAVIS, Tallahassee, FL.

For Nat'l Assoc. of Home Blders, Amicus: WILLIAM H. ETHIER, Cohn & Birnhaum, Hartford, CT. ROBIN L. RIVETT, Sacramento, CA. For 1000 Friends of Florida, Amicus: RICHARD GROSSO, Tallahassee, Florida. For FL DEPT OF COMM. AFFAIRS, Amicus: DAVID J. RUSS, Asst. General Counsel, Tallahassee, Florida.

JUDGES: Before TJOFLAT, Chief Judge, KRAVITCH, Circuit Judge, and CLARK, Senior
Circuit Judge.

OPINIONBY: KRAVITCH

OPINION: [*1413] KRAVITCH, Circuit Judge:

At issue in this case is the constitutionality of the developmental regulations placed on an approximately 40 acre tract of waterfront land in Lee County, Florida. Because we hold that the federal courts lack jurisdiction on ripeness grounds, we REVERSE the judgment of the district court, and REMAND this case to the district court with instructions to remand the cause to the state court from which it was removed.

I.

In 1944, appellee Richard Reahard's parents purchased a 540 acre tract of land in Lee County, Florida. Over the next

three decades, his parents made use and profit from the 540 acre tract, subdividing, filling, developing and selling many single lots. By 1975, they retained only a 40 acre tract of undeveloped wetlands, which is the subject of this action.

Upon the death of Richard Reahard's mother on November 30, 1984, he inherited the 40 acre site and sought to develop it as either a 41 or 126 unit lot subdivision for [**2] single-family residences. This plan was thwarted when the Lee County Board of Commissioners passed the Lee County Comprehensive Land Use Plan ("Lee Plan") on November 16, 1984. The Lee Plan took effect in December 1984.

The Lee Plan classified the Reahards' n1 property as a Resource Protection Area ("RPA"), limiting development either to a single residence, or for use of a "recreational, open space or conservation nature." n2 The Reahards opposed this classification by pursuing several available administrative procedures. On January 27, 1988 they sought an amendment to the Lee Plan which would have upzoned the property. The Lee County Board of Commissioners denied this request. The Reahards then sought an "administrative interpretation" of their development rights, pursuant to Section XIV of the Lee Plan. That section requires, *inter alia*, that "interpretations [of the Lee Plan] which would be confiscatory, arbitrary, capricious, [*1414] unreasonable, or which would deny all economically viable use of property shall be avoided." Lee Plan, Admin.Interp. Chapter XIV-6B(1). It also provides an exception to the Lee Plan where "vested rights" exist, and sets forth standards for determining [**3] when an applicant may claim this exception. Id., Chapter XIV-7(6).

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n1 Richard Reahard's wife, Ann P. Reahard, was added as a party after this action was filed.

n2 Under the Lee Plan, RPA wetlands are considered "areas

in which it is necessary to protect, conserve, restore or preserve water resource systems and the biological functions attendant thereto." Lee Plan, Policy 1.5.1, p. II-7. Deemed "unsuitable for all but extremely low density development," their preservation prevents degradation of natural resources, including water quality, freshwater storage capabilities, biological productivity, and viability of plants and animals. *Id.* Their preservation also prevents flooding. Id. Lee County has prohibited the construction of ditches, canals, dikes, roads above grade, and additional drainage on RPA wetlands. *Id.* at II-7-8. Maximum density on RPA sites is one dwelling unit per forty acres. Id. at II-8. It is undisputed that the site in this case is a pristine wetland, and is inundated with water during high fall and spring tides, and during any powerful storm.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

[**4]

In July 1990, the Lee County Attorney's Office, the administrative designee under the Lee Plan, ruled that the Reahards were entitled to construct four single-family residences on the parcel. The Reahards appealed this determination to the Board of County Commissioners, on the ground that it was based on mistakes in deeding and land boundaries. On September 19, 1990, the Board issued a final decision, upholding the administrative determination rejecting the Reahards' proposal, but "modif[ying it] to reflect approval for one single family residence on the 35 acre parcel."

Over one year previous to the Board's decision, on September 1, 1989, the Reahards had filed the instant complaint in Florida state court. They alleged that although the classification of their land as an RPA was a valid exercise of the County's police power, it constituted a taking under state and federal law entitling them to just compensation. n3 On October 5, 1989, Lee County removed to federal court. n4

----------Footnotes----------

n3 Specifically, the Reahards invoked sections 163.3194(4)(b) and 380.08 of the Florida Statutes, Article X, Section 6 of the Florida Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution. [**5]

n4 For a complete description of this case's prior procedural history and the evidence presented below, see *Reahard v. Lee County*, 968 F.2d 1131, 1133-34 (11th Cir.1992).

----------End Footnotes----------

The case was heard before a magistrate judge, pursuant to 28 U.S.C. @ 636(c)(1), n5 and was limited to the issue of whether a taking had occurred. The magistrate judge held that a taking had occurred because but for the Lee Plan "some of the property" could have been developed and, moreover, because the Lee Plan had caused a "substantial deprivation of the value" of the parcel. The magistrate judge further held that the Reahards had exhausted their administrative state remedies. A jury awarded them $ 700,000.00, plus interest accrued, as just compensation.

----------Footnotes----------

n5 Parties may consent to have a United States magistrate judge "conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves." 28 U.S.C. @ 636(c)(1).

----------End Footnotes----------

[**6]

Lee County appealed directly to this court, pursuant to 28 U.S.C. @ 636(c)(3). n6 We reversed the magistrate judge's order, *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir.1992), and held that the magistrate judge had misapplied the test for regulatory takings. Subsequently, we issued an addendum opinion instructing the magistrate judge to address the question of ripeness and determine whether the district court had jurisdiction over this matter. *Reahard v. Lee County*, 978 F.2d 1212, 1213 (11th Cir.1992). As to jurisdiction, we noted not only that there was a "question regarding the Reahards' efforts to secure appropriate administrative remedies," but also that there was "nothing in the record regarding the judicial remedies available in Florida state courts." Id. Specifically, we recognized that "assuming that these claims could be satisfied through adequate state judicial procedures, the Reahards have not stated a ripe federal claim under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), [**7] and there is no subject matter jurisdiction." *Id.*

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n6 Title 28 U.S.C. @ 636(c)(3) provides that "an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court."

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On remand, the magistrate judge held that all state remedies had been exhausted because no remedy existed under Florida law, and that no further administrative remedies existed. Again holding that a taking had occurred, the magistrate judge reinstated the jury verdict of $ 700,000.00. We

now revisit our prior rulings, and hold that based on the analysis required by *Williamson*, this matter is not ripe for review and the federal courts therefore lack subject matter jurisdiction.

[*1415] II.

The question of ripeness "goes to whether the district court had subject matter jurisdiction." *Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 (11th Cir.1989). [**8] As a jurisdictional issue, it is reviewed by this court de novo. See generally *Tamiami Partners v. Miccosukee Tribe*, 999 F.2d 503, 507 (11th Cir.1993); *United States v. Perez*, 956 F.2d 1098, 1101 (11th Cir.1992); see also *Gemtel Corp. v. Community Redevelopment Agency*, 23 F.3d 1542, 1545 (9th Cir.1994) ("We review ripeness *de novo*.") (citation omitted).

Lee County argues that the Reahards' claim did not ripen until the County Board of Commissioners issued its September 19, 1990 decision denying permission to build anything but a single-family residence and affirming as modified the administrative determination. It contends that five months prior to that date, the Florida Supreme Court recognized a state compensation remedy for regulatory takings in *Joint Ventures, Inc. v. Department of Transp.*, 563 So.2d 622 (Fla.1990). The County therefore argues that the federal courts have never had subject matter jurisdiction, and that until the Reahards pursue their state remedy this matter is not ripe for review. For the reasons that follow, we agree.

As we have noted previously, [**9] this is a just compensation action, in which the aggrieved landowners seek only monetary compensation for the value taken. See *Reahard*, 968 F.2d at 1135. n7 "In order for such a claim to be ripe for adjudication, the landowner must overcome two hurdles: the final decision hurdle and the just compensation hurdle." Id. at 1135 n. 7 (quoting *Eide v. Sarasota County*,

908 F.2d 716, 720-21 (11th Cir.1990), cert. denied, 498 U.S. 1120, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991)). To satisfy the "final decision" hurdle, an aggrieved landowner must demonstrate that the decisionmaker "charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186, 105 S.Ct. at 3116. n8 In other words, a just compensation claim cannot ripen until the "local authority has determined the nature and extent of the development that will be permitted." *Eide*, 908 F.2d at 721. [**10]

----------Footnotes----------

n7 In a just compensation claim, as opposed to a due process takings claim, the aggrieved landowner "does not seek "an invalidation of the local authority's application of the regulation,' ... but simply monetary compensation for the value taken." *Reahard*, 968 F.2d at 1135 (quoting *Eide v. Sarasota County*, 908 F.2d 716, 720-21 (11th Cir.1990), cert. denied, 498 U.S. 1120, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991)).

n8 In *Williamson*, 473 U.S. at 191, 105 S.Ct. at 3118-19, the Court held no "final decision" had been reached until the local planning commission "determined that no variances will be granted," because only then could a jury determine whether respondent would "be unable to derive economic benefit" from the land.

----------End Footnotes----------

In most cases, no "final decision" has been reached until an aggrieved landowner has applied for at least one variance [**11] to a contested zoning ordinance. See *Williamson*, 473 U.S. at 186, 105 S.Ct. at 3116 (claim not ripe where respon-

dent did not seek variances from Board of Zoning Appeals); *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1547 (11th Cir.1994) ("In most instances a property owner must apply for a variance for a less intrusive use, to determine what use the municipality will allow...."); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1540 (11th Cir.) (aggrieved landowner must "have sought variances or pursued alternative, less ambitious development plans"), cert. denied, U.S. , 112 S.Ct. 55, 116 L.Ed.2d 32 (1991).

In the present case, the Reahards initially sought what was in effect a variance from the Lee Plan, by requesting that the Board's administrative designee issue an "administrative interpretation" regarding their proposed 127 unit development. n9 The administrative [*1416] designee—in this case, the Lee County Attorney—determined that the Reahards had the right to build four single [**12] residences on the parcel. The Reahards appealed this decision to the Lee County Board of Commissioners, which, acting pursuant to the appeals process set forth in the Lee Plan, affirmed as modified the administrative determination on September 19, 1990. The Board's rejection of the proposed development concluded the administrative review process set forth in the Lee Plan, and therefore represented a "final decision" on the Lee Plan's application to the property. See *Greenbriar*, 881 F.2d at 1575-76 (final decision reached when City Council and Planning and Zoning Commission had rejected property owner's proposals). n10 Until the Board's decision was issued, it had not been conclusively determined that the Reahards would not be permitted to exceed the single residence limitation on RPA land set forth in the Lee Plan. The Reahards' claim therefore could not have ripened, if ever, until September 19, 1990, the date of the Lee County Board of Commissioners' final decision. n11

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n9 Under the Lee Plan's administrative guidelines, zoning designations initially are challenged before the Plan's administrative designee—here, the Lee County Attorney's Office. That designee determines whether to affirm the classification or issue a variance. A variance from the Lee Plan designation may be issued according to the following guidelines:

(1) Interpretations [of the Lee Plan] which would be confiscatory, arbitrary, capricious, unreasonable, or which would deny all economically viable use of property shall be avoided;

....

(3) All interpretations should weigh the public benefits and burdens against the private benefits and burdens to be imposed.... If the effect of the interpretation would be to relieve or prevent a substantial public burden, greater weight should be given to the relief or prevention of that burden;
(4) Interpretations should be consistent with background data, other policies, and objectives of the Plan[.] Lee Plan, Admin.Interp. Chapter XIV pp. 6-8. The Lee Plan also recognizes a "vested rights" remedy, which exists where an applicant has relied in good faith and to his substantial detriment on an act or omission of Lee County. *Id.* Chapter XIV p. 7.

An aggrieved landowner may appeal the administrative designee's determination concerning these remedies to the full Board of County Commissioners, which then must issue a final decision within thirty days. *Id.* Chapter XIV p. 9. [**13]

n10 In some cases, an administrative decision might be sufficiently final without resort to any appeals process. See, e.g., *Weissman v. Fruchtman*, 700 F.Supp. 746, 755

(S.D.N.Y.1989) ("An administrative decision may be a sufficiently final action to satisfy the finality requirement without representing an exhaustion of all available administrative remedies."). But where, as here, the variance process explicitly provides for an "appeal" to the authoritative local decisionmaker—such as, in this case, the Board of Commissioners—the appeal must be fully pursued before any definitive "final" decision occurs. Compare, e.g., *Milne v. Township of Oregon*, 777 F.Supp. 536, 537-38 (E.D.Mich.1991) (appeal from denial of variance a prerequisite to claim of taking without just compensation) with *Patrick Media Group, Inc. v. City of Clearwater*, 836 F.Supp. 833, 836 (M.D.Fla.1993) (appeal from denial of variance unnecessary where ordinance did not provide for such appeal).

n11 The County does not contend that the Reahards' claim ripened on a date after the Board's September 19, 1990 decision rejecting appellees' proposed 127 unit subdivision. We therefore need not address whether the submission of further, more modest proposals might have been acceptable to the County and might therefore have been a further prerequisite to ripeness. Compare *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351-53, 91 L. Ed. 2d 285, 106 S. Ct. 2561 and n. 9, 106 S.Ct. 2561, 2567-68 and n. 9, 91 L.Ed.2d 285 (1986) (Planning Commission's initial rejection of proposed 159 residence subdivision, based on inadequacies in plan, did not render just compensation claim ripe; "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews").

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This conclusion does not end our ripeness inquiry. The Reahards' claim has ripened only if the "just compensation"

hurdle has been met, i.e. if "all state procedures for just compensation have been utilized." *Eide*, 908 F.2d at 723 (citing *Williamson*, 473 U.S. 185-86; 105 S.Ct. at 3116); see also *Executive 100*, 922 F.2d at 1542 ("If the government has provided an adequate process for the property owner to obtain compensation [such as inverse condemnation proceedings], and if resort to that process yields just compensation, then the owner has no just compensation claim.") (citing *Williamson*, 473 U.S. at 195). The rationale for this requirement is that "the State's action is not "complete' in the sense of causing a constitutional injury "unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.' *Williamson*, 473 U.S. at 195, 105 S.Ct. at 3121 [**15] (quoting *Hudson v.Palmer*, 468 U.S. 517, 532 n. 12, 104 S.Ct. 3194, 3203 n. 12, 82 L.Ed.2d 393 (1984)). While "the finality requirement is concerned with whether the initial decisionmaker has actual, concrete injury[,] the exhaustion requirement [*1417] generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy." *Id.* at 193, 105 S.Ct. at 3120. Cf. *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1493 (11th Cir.) (regulatory takings claim ripens only after "state judicial authorities ... make a final determination on the status of the subject property") (Tjoflat, C.J., concurring specially) (citing *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990)), cert. denied, U.S. , 114 S.Ct. 439, 126 L.Ed.2d 373 (1993). n12

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n12 Two special concurrences in *New Port Largo*, 985 F.2d 1488 (*per curiam*) indicate some tension between this circuit's precedent in *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir.1990) and *Williamson*, as to the accrual of a claim that property has been taken without just compen-

sation. Compare *New Port Largo*, 985 F.2d at 1497 (Tjoflat, C.J. concurring specially) ("under *Corn* [as opposed to *Williamson*] a federal takings claim ripens only after the property owner has exhausted all legal means of challenging the ordinance;" thus, "*Corn* erred by improperly expanding *Williamson*'s final decision requirement until "state review entities'—rather than the initial decisionmakers—"have made a final determination' ") with *New Port Largo*, 985 F.2d at 1499 (Edmondson, J., concurring specially) (*Corn* addressed statute of limitations accrual, but "did not decide (because it was unnecessary to decide) when *Corn*'s taking claim first became ripe ... for federal adjudication") (citing *Corn*, 904 F.2d at 588).

We are mindful of these concerns. Based on the circuit precedent cited herein, however, and also recognizing that *New Port Largo* and *Corn* involved accrual for purposes of the statute of limitations, not ripeness, we employ the two-pronged approach set forth in *Williamson*. The result is identical under either approach: until the Reahards pursues their remedy in Florida's courts, their claim is not yet ripe.

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[**16]

It follows that "as a practical matter, *Williamson* precludes litigation of the merits of a just compensation claim in federal court unless the state declines to provide adequate procedures through which an aggrieved party might seek compensation." *New Port Largo*, 985 F.2d at 1496 (Tjoflat, C.J., concurring specially). The dispositive issue in this case therefore is whether the Reahards had at their disposal an available state remedy, such as an inverse condemnation action, at any time before the Board's final decision was issued in September 1990. If they did not, then this case became ripe on September 19, 1990, upon the final decision by the Board of Commissioners. But if they did, then this case has not yet ripened

for purposes of federal review.

Before April 1990, it was not clear whether Florida's courts recognized an inverse condemnation remedy based on zoning classifications. In *Joint Ventures, Inc. v. Department of Transp.*, 563 So.2d 622 (Fla.1990), which was decided in April 1990 and involved a state-imposed development moratorium, the Florida Supreme Court for the first time explicitly recognized such [**17] a cause of action. See *Id.* at 624 ("The state must pay when it regulates private property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property."); *Executive 100*, 922 F.2d at 1542 ("The Florida courts have recognized that ... property owners have the right to bring reverse condemnation proceedings seeking compensation for regulatory takings.") (citing *Joint Ventures*, 563 So.2d 622); see also *Palm Beach County v. Tessler*, 538 So.2d 846 (Fla.1989) (recognizing inverse condemnation action where county blocked off access to property located on roadway; reasoning that "there is a right to be compensated through inverse condemnation when government action causes a substantial loss of access to one's property even though there is no physical appropriation of the property itself"). This court, in turn, has held that a Florida property owner must pursue a reverse condemnation remedy in state court before his federal takings claim will be ripe, even where that remedy was recognized after [**18] the alleged taking occurred. *Executive 100*, 922 F.2d at 1542 (affirming dismissal of due process takings claim and just compensation claim).

As we have noted above, the Lee County Board of Commissioners decision issued on September 19, 1990 fulfilled the "final decision" requirement of *Williamson*. Several months earlier, however, the Florida Supreme Court recognized an inverse condemnation remedy. Thus, by the time that the "final decision" obstacle was removed from the path

of the Reahards' federal claim, a second obstacle to that claim had been erected [*1418] in the form of a newly-recognized state remedy for inverse condemnation. The Reahards' claim therefore never has become ripe while on the federal court docket; until they have pursued their state remedy, the federal courts are without subject matter jurisdiction. n13

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n13 The Reahards argue that we should disregard the holding in *Joint Ventures* because that opinion was issued subsequent to the removal of the case to federal court in October 1989, and is therefore not relevant. This might be a persuasive argument if subject matter jurisdiction had existed at the time of Lee County's removal to federal court. See *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612 (1972) ("Where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is ... whether thefederal district court would have had original jurisdiction of the case had it been filed in that court."); cf. *Bor-Son Bldng. Corp. v. Heller*, 572 F.2d 174, 181 (8th Cir.1978) (party who removes from state court of competent jurisdiction may not later secure dismissal based upon jurisdictional defects in removal court). But in this case, neither the federal nor the state courts ever had jurisdiction until the Board of Commissioners issued its "final decision" on September 19, 1990, long after the removal to federal court. See *Williamson*, 473 U.S. at 191, 105 S.Ct. at 3118-19; *Martinez v. Bolding*, 570 So.2d 1369, 1371 (Fla.Dist.Ct.App.1990), review denied, 581 So.2d 163 (Fla.1991); *Glisson v. Alachua County*, 558 So.2d 1030, 1035-36 (Fla.Dist.Ct.App.) (adopting Federal ripeness doctrine with respect to "final decision" requirement), review

denied, 570 So.2d 1304 (Fla.1990). The date of removal therefore is not dispositive in determining the date on which the claim ripened.

----------End Footnotes----------

[**19]

III.

For the reasons set forth above, we REVERSE the judgment of the district court, and REMAND this case to the district court with instructions to remand the cause to the state court from which it was removed.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RICHARD REAHARD and ANN P. REAHARD,
Plaintiffs,

vs.

LEE COUNTY, FLORIDA,
Defendant.

CASE NO. 89-227-CIV-FTM-10D

AMENDED ORDER OF TAKING
FOLLOWING REMAND

This Cause was remanded to this Court from the Eleventh Circuit Court of Appeals for factual findings and a taking analysis in accord with case precedent pursuant to *Reahard v. Lee County*, 968 F.2d 1131 (11th Cir. 1992). The Eleventh Circuit Court of Appeals also remanded this matter in a supplemental opinion regarding the question of ripeness to determine if the District Court has jurisdiction over this matter. See, *Reahard v. Lee County*, 978 F.2d 1212, (11th Cir. 1992).

FACTS

This is an action for inverse condemnation. The property that is the subject matter of this lititgation is owned by the

plaintiffs, Richard Reahard and Ann Reahard, husband and wife. (tr.trans. p.58) The property is located a half a mile from Bonita Beach is south Lee County near the Bonita Bay Development (tr.trans. p.69, 93) From the Reahards' property there is direct access to the Gulf of Mexico which is approximately one to one and a half miles from the property. (tr.trans. p.93, 94)

Richard Reahard's parents acquired the property from Peninsula Land Company in 1944. Mr. Reahard's parents owned the land until his father's death when the land passed to his mother who owned it until her death at which time Richard Reahard inherited it. (tr.trans. p.60) Richard Reahard then proceeded to give his wife a half interest in the property. (tr.trans. p.59, Pl.exh. 1A, 1B) Richard Reahard's parents paid $1250.00 cash for 540 acres of land (hereinafter "larger tract") in 1944 of which the subject property is a small part, approximately 38 to 42 acres. (tr.trans. p.96, 181) Richard Reahard or his family have paid the taxes on the property since the time they acquired it. (tr.trans. 0.70)

A plat was drawn for the larger tract of property including the subject property in the late 1950's and it was recorded in the public records of Lee County, Florida in 1961. (tr.trans. p.61, 198, see Pl.exh. 3) Richard Reahard became involved in the property development in 1955. (tr.trans. p.61) On the larger tract of land, at first the Reahards did all of the engineering work themselves but later hired Carl Johnson's engineering firm to do the engineering work and develop the plat. (tr.trans. p.62) Johnson engineering staked the lots and laid out the streets and the Reahards proceeded with the digging of the canals and the constructing of the streets. (tr.trans. p.62) The Reahards obtained fill for the property from the canals that were dug from the larger tract. (tr.trans. p.72) Prior to the Lee County Comprehensive Plan of 1984 (hereinafter "Lee Plan"), the Department of Environmental Regulation and the Army Corp of Engineers never denied

permits to the Reahards on the merits of the permits. (tr.trans. p.86, 87) The Reahards developed a brochure regarding the property and advertised the property throughout the country. (tr.trans. p.62, Pl.exh.8) Various surveys were done of the property by Carl Johnson's firms and by Tri-County Engineering (tr.trans. p.63) When Richard Reahard inherited the property, he planned on developing it according to the recorded plat. (tr.trans. p.112, 113, 134)

The individual lots in the larger tract were sold by both a metes and bounds description and by a lot and block description which was taken from the recorded plat. (tr.trans. p.73) The County also used the lot and block description in some of its documents. (tr.trans. p. 73) The subdivision delineated in the plat was never formally accepted by Lee County, however, roads were accepted. (tr.trans. p. 73-4) The County maintains the roads on the larger plat except for one private road. (tr.trans. p. 74) Richard Reahard's parents never fully developed the property prior to the Lee Plan due to their lack of finances to pay for the development. (tr.trans. p.86)

The property is located in a single-family residential area. (tr.trans. p. 601) The type of homes are single-family detached residential dwelling units. (tr.trans. p.601) The older structures were constructed in the late 1950's and early 1960's and are slab on grade construction. (tr.trans. p.601) The newer construction is more oriented to wood frames, stilt construction at elevation of 12 feet above sea level. (tr.trans. p. 601). It is a well maintained area. (tr.trans. p. 605)

The subject property was first formally zoned in 1964 and was zoned RS-1, RM-1, RM-2 and industrial, IL. (tr.trans. p.68, 151 Pl.exh.5A, 5B) RS-1 is single family, RM-1 and RM-2 are multifamily zoning categories and IL which is a light industrial category. (tr.trans. p. 167) Under IL, Mr. Reahard would have been permitted commercial uses, multi-family uses, hotel/motel uses, commercial marina uses, and other types of water uses. (tr.trans. p. 168) The Lee Plan

then changed the zoning to RPA, Resource Protection Area. (tr.trans. p.75, 89, 151) Richard Reahard contacted the County after the zoning change to determine his development choices. (tr.trans. p. 87) According to letters he received from the County he could build one unit per 40 acres. (tr.trans. p. 87, Pl. exh. 10, 11, 15) In addition, the property could be used for passive recreational activities, such as nature trails, canoe trails, and boardwalks (tr.trans. p. 151) Prior to the zoning change, Richard Reahard planned to develop 126 units on the property. (tr.trans. p.75)

The subject property is primarily dominated by mangroves. (tr.trans. p. 292, 562) The subject property is comprised of wetlands which function normally. (tr.trans., p. 562) There is a partially constructed roadway along the northern perimeter that runs from east to west. (tr.trans. p. 292) There is a partially constructed canal along the east side of the property. (*Id.*) There appears to be some mosquito ditching on the property. (*Id.*) There is encroachment of exotic vegetation along the impacted areas (meaning areas with some type of construction which alters the normal hydrology of a site to be different and not supportive of the natural vegetation [tr.trans. p.297, see also p. 483]), primarily along the road and the canal. The exotic species are Australian pines, and Brazilian pepper trees. (*Id.*) There are deposits of fill on the north and west and some on the south side along the existing road. There are some berms that are scattered. (*Id.*) The subject land is partially submerged during high spring tide, during the fall, during the equinox period and during heavy storms (tr.trans. p. 67) Spoils were deposited on the property from finger canals that had been cut into the larger tract disturbing the wetlands ares. (tr.trans. p. 272) There is only one to two areas of land on the subject property that is impacted. (tr.trans. p.572)

The Reahards received two offers for purchase of the property (tr.trans. p. 84) There was an offer to purchase the

property by Andrew Messick for $1.2 millions dollars. (tr.trans 84-85, Pl.exh. 25) Carmen Reahard rejected the offer due to the buyers not paying her any money up front. Essentially the deal was compromised of the potential buyers speculating with her property. (tr.trans. p.85) There was a second offer but none of the details were given. (tr.trans. p. 85) Richard Reahard attempted to sell the property after the Lee Plan was enacted by advertising in the News-Press but was unsuccessful. (tr.trans. p.85) No offers were ever made on these advertisements. (tr.trans. p. 85) In addition, in 1984 Richard Reahard claimed that the property was valued at $30,000 for estate tax purposes which was the value that the tax accessor gave the property. (tr.trans. p.108)

The plaintiff's engineer testified that the property could be developed from 41 to 126 lots. (tr.trans. 298) The appraiser for the plaintiff found that based on comparable sales if the Reahards developed 41 to 43 lots on their property, the value of the property would be $615,000 to $645,000. (tr.trans. 255) If the Reahards were able to develop 126 units on their property, the value of the property would be $2,268,000. (tr.trans. 256). These figures represent the net amount for the property meaning that the costs of development had already been deducted. (tr.trans. p. 254) The plaintiff's expert engineer believed that he could obtain permits from both DER and the Army Corps of Engineers for both the 41 lot or the 126 lot developments. (tr.trans. p. 303) He would use either a sewer plant or septic system for these developments. (tr.trans. p. 308) After the enactment of the Lee Plan, the plaintiff's appraiser estimated the value of the property if one single-family residence was built to be $25,000. (tr.trans. p.274) The plaintiff's environmental consultant, Rayann Boylan testified that once lands are filled they become uplands and then one obtains a permit for the septic tank for an agency other than the Department of Environmental Regulation. (tr.trans. p.696, 706-7) Ms.

Boylan opined that the 43 unit development would be permitable with septic tanks. (tr.trans. p. 707) In addition, Ms. Boylan stated that with the 43 unit development, the property that was not developed could be used as mitigation property and the Reahards would not have to purchase additional lands to mitigate. (tr.trans. p.708)

The defendant's biological expert, Mr. Beever, testified that Department of Environmental Regulation would have taken jurisdiction over this property due to the type of plants that were present. (tr.trans. p. 419) The Department of Environmental Regulation principal function is to be a permitting agency for the State of Florida for development involving environmental impacts such as dredge and fill permits and waste water treatment systems. (tr.trans. p.413) In Mr. Beever's opinion, septic tank permits would have been denied for the 126 unit development. (tr.trans. p.429) Mr. Beever opined that the 43 unit development would more likely be permitted with modification and a possible down-sizing but would not be permitable as was drawn due to the waste water treatment problems. (tr.trans. p. 429, 454) He felt more comfortable that at most 24 units could be developed on the property. (tr.trans. p. 438) Mr. Beever stated that Mr. Reahard could develop houses on his property along the south side of the parcel and along the west side of the canal if he donated the rest of the land for a conservancy-type use and had an off-site sewage system. (tr.trans. p. 465) The defendant's expert engineer, Mr. Hole stated that for the both the 43 units development and the 126 unit development without off-site mitigation, the developments would not have been permitted. (tr.trans. p.481, 483) Mr. Hole testified that he did not believe that the Reahards could obtain permits to build houses along the existing roadway with septic tanks. (tr.trans. p.485) The defendant's expert ecologist stated that neither the Army Corps of Engineers nor the Department of Environmental Regulation would have issued permits for the

126 unit design. (tr.trans. p. 565) He also stated that the 43 unit development was better environmentally than the 126 unit development, however, the 43 unit development would also not be permitted. (tr.trans. p.569) The defendant's appraiser, Mr. Woodward Hanson stated that the highest and best use of the property would be low density residential development which would be one unit on the property. (tr.trans. p. 643, 646) The defendant's second real estate appraiser, Micheal Maxwell stated that in opinion, the value of the subject property of 42 acres prior to Decemebr 21, 1984 (the date of the Lee Plan) was $4,000 per acre for a total of $168,000. (tr.trans. p.659-60) The value of the property after December 21, 1984 is $70,000 for the homesite and $98,000 for the 41 acres of wetlands surrounding the home. (tr.trans. p.664) Therefore, Mr. Maxwell opines that the property's values remained the same before and after the Lee Plan took effect. (tr.trans. p. 670) However, Mr. Maxwell's opinion did not consider the possibility that a 41 unit development could have occurred prior to the Comprehensive Plan but not after. (tr.trans. p.666) Mr. Maxwell was unable to find any comparable property where the homeowner was able to place one homesite on a property and have a 41 acre backyard that is undevelopable. (tr.trans. p.675)

In 1984, Mr. Reahard had two adjacent lots that were north of the subject property and already had fill that could have been used for a swage treatment plant. (tr.trans. p. 692) Mr. Reahard owns other lands that could also be made available for use of a sewage treatment plant. (tr.trans. p. 694)

TAKING

In the case of *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990) the Court identified four types of taking challenges that a land owner may bring: "(1) just compensation

claims; (2) due process takings claims; (3) arbitrary and capricious due process claims; (4) equal protection claims." *Id.* at 720. The Court determined that under a just compensation claim, the plaintiff is not seeking to invalidate the local authority's application of the regulation but simply is requesting monetary compensation for the value of the property taken. *Id.* at 721. Mr. Reahard in his Complaint states that the RPA designation interfered with his reasonable investment-backed expectations and therefore, requested monetary compensation. (Doc. 1) The only issue in this case is "whether an owner has been denied all or substantially all economically viable use of his property. *Eide v. Sarasota County*, 908 F.2d 716, 721 (11th Cir. 1990), See also *Reahard v. Lee County*, 968 F.2d. 1131 (11th Cir. 1992) The Eleventh Circuit stated that this Court must now aply the above facts to the *Penn Central* multifactor inquiry. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)

What constitutes a taking is a problem of "considerable difficulty." *Penn Central* 438 U.S. at 123. The Supreme Court has been unable to determine any set formula for determining when "'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* at 124. The Supreme Court has identified "several factors that have particular significance" to the question of whether a taking has occurred. *Id.* "The economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant consideration. *Id.* (citations omitted)

The Court has carefully considered all of the testimony and exhibits of the parties. There is no question in the Court's mind that the subject property is a pristine wetlands area with few environmental impacts on it. Nonetheless,

according to the plat that was recorded, the Reahards intended to build a 126 unit development prior to the Lee Plan. The property had the proper zoning for such a development namely, RS-1, RM-1, RM-2 and IL which would have permitted the 126 unit density. The only question then becomes whether the Reahards would have been able to obtain permits for this development. Taking all the experts information regarding permitting prior to 1984, it appears very questionable whether the Reahards would have been able to obtain proper permits from the Department of Environmental Regulation and the Army Corps of Engineers for the 126 unit development. It appears that the main problem would have been the sewage or septic tank system needed for this development. However, it is obvious to the Court that the Reahards would then have modified their plans so that permitting would have been available and a plan such as the 41 unit development would have surfaced. According to experts from both parties this development modified with fewer units would have been permitable especially if the Reahards used other uplands tracks of land for the septic or sewage system and donated the remaining land to the State or maintained the remaining land in a pristine wetlands manner.

After the Lee Plan was enacted, the Reahards could build only one unit on the entire tract. The Court does not find credible the defendant's appraiser who stated that the area outside of the homesite would be worth $98,000 to a buyer. Although this property may be pristine, if it is not income producing or usable for some purpose other than recreation it has little or no market value, certainly not $98,000. The only value the land would have is the $25,000 - $70,000 depending on which expert you believe. Therefore, the property with one homesite has very little value. However, if the property were to have a 24 - 41 unit development on it, the property value would be greatly increased possibly to be valued to a net value of including development costs

$645,000 as plaintiff's expert testified. (It is not for the Court to determine at this time the actual value of the property as this case is bifurcated and a jury will decide the amount of loss if any to the Reahards). The Reahards' investment-backed expectations were greatly diminished by the enactment of the Lee Plan and the subsequent change in zoning.

RIPENESS

The Eleventh Circuit Ordered this Court to revisit the issue of ripeness regarding whether the Reahards had pursued all of their state judicial remedies prior to this action as well as their administrative remedies prior to this action.

STATE JUDICIAL REMEDIES

This action was originally filed by the Reahards in the Twentieth Judicial Circuit in and for Lee County, Florida. The defendant petitioned for removal of this action. (Doc.1) Pursuant to the Petition for Removal (Doc. 1), the matter was removed on October 5, 1989. On October 12, 1989, the plaintiffs[1] consented to the removal. (Doc.3)

In the Complaint (Doc.1), the plaintiffs state, "This is an action for inverse condemnation and damages in excess of $5,000." (Complaint, Doc.1, para.1) Clearly from the Complaint, the plaintiffs were requesting money damages and not an invalidation of the zoning ordinance.

The question of whether the Reahards could have brought this action in state court is a question of Florida law. According to the case of *Lee County v. Morales*, 557 So.2d 652, 656 (2nd DCA, 1990),

> a zoning change cannot give rise to a cause of action for inverse condemnantion. [Citations Omitted]

> Thus, even if the zoning ordinance were appropriately found to be confiscatory, appellees would not be entitled to a damage remedy. Where a zoning ordinance is held confiscatory, the only remedy available is to obtain a judicial determination that the ordinance is unenforceable and must be stricken.

The case of *Lee County v. Morales*, was decided on Febuary 28, 1990 which is after the date, October 5, 1989, that the Reahards' case was removed to Federal Court and after the plaintiffs consented to the removal on October 12, 1989. The Eleventh Circuit case of *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987) contains a history of Florida law regarding the lack of damage remedies in Florida for inverse condemnation cases particularly involving zoning changes. The Court in *Corn* states:

> we conclude that Florida does not avail a property owner an action to recover just compensation through inverse condemnation for injuries sustained as a result of an unreasonable zoning ordinance later declared invalid... As discussed above, the cited authorities are persuasive that the remedy of invalidation is an exclusive one pursuant to Florida law, because zoning is a function of the police power rather than the exercise of eminent domain.
> *Id.* at 1519

Therefore, at the time of removal, the Reahards had no remedy in State Court for inverse condemnation.[2]

ADMINISTRATIVE REMEDIES

According to the Order of Remand, pursuant to the case of *Williamson County Regional Comission v. Hamilton Bank*,

473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), the Reahards must have exhausted their administrative remedies prior to bringing this law suit.[3] Lee County raises three areas in which they claim the Reahards have failed to exhaust their administrative remedies, namely in the areas of vested rights, equitable estoppel and failure to request a development order.

Vested Rights

Under Chapter XIV, Administrative Interpretations of the 1984 Lee Plan, Section B.(6) (Def. exh. 1A), it provides:

> [V]ested rights shall be deemed to exist where it is clearly shown by the applicant that:
> (a) The applicant has relied on an official affirmative act or omission of a required act of Lee County, within the scope of the County's authority; and
> (b) The applicant has acted in good faith and without knowledge that existing or pending regulations might prohibit or prevent the development expectations claimed to be vested; and
> (c) The applicant has acted to his or her substantial detriment in reliance upon the County's act or approval, and, such that it would be highly inequitable and unjust to destroy the rights he or she has acquired. (Pl. exh. 9A)

This provision also provides that the property owner must have applied for a vested rights administrative determination within six months from the effective date of the Plan. The Lee Plan was enacted on December 21, 1984. The testimony is undisputed that the Reahards failed to apply for a vested rights determination under this provision of the act. (See, Doc. 60, tr.trans. p. 194)

The first question the Court must consider is whether this

Vested Rights provision applied to the Reahards and their property.[4] Under the Vested Rights Provision, the Reahards must have relied on an official affirmative act or omission, acted in good faith and acted to their substantial detriment in reliance upon the County's act or approval and "such reliance would make it highly, inequitable and unjust to destroy the rights" they required.

First, the County must have done an official affirmative act or omission. Lee County's expert, Dr. Gottschalk appeared to have little knowledge of the actual property when he testified that Lee County's affirmative acts were to continue the issue of building permit in the Reahard's subdivision. (Doc. 60, tr.trans. p. 404). These building permits were not done on the subject property which was zoned RPA and the subject matter of the litigation, but rather on a larger tract that the Reahards owned previously. Other than that action by Lee County, Dr. Gottschalk mentioned no other affirmative acts by Lee County other than zoning. Ms. Keyes testified that she was aware of no affirmative acts done by Lee County which would have allowed the Reahards to prevail in an application for Vested Rights. (Doc. 60, tr.trans. p. 194) Mr. Reahard testified that the reason that development was stopped on the property was not that governmental agencies would not give him a permit but rather that his family ran out of money. (tr.trans. p.138) Therefore, there was no testimony to support that the County had done any affirmative acts to the property under the vested rights provision except for the changing of the zoning.

Assuming that the change of zoning was considered an affirmative act, then the question becomes did the Reahards act to their "substantial detriment" in reliance upon the County's act. The Reahards expended considerable amounts of money on the larger tract when developing it. On the subject property, however, it appears that the Reahards put in a partial road and a few other minor changes but did not

expend a great deal of money on the property mainly because Mrs. Reahard lacked the funds to improve the property. According to plaintiff's expert, Ms. Stephanie Keyes who is a land use planner, "the vesting requirements were very strict and related to the amount of money spent on a piece of property and whether or not the county — I believe you had vested rights or vested interest in the property in that you expended considerable sums of money and relied on previous approval of the County." (Doc. 60, tr.trans. p. 165-66) Ms. Keyes interpretation of the Lee County Plan is consistent with the language of the plan in that the Reahards must have relied to their "substantial detriment" under the Lee Plan. Ms. Keyes further stated that it would have been futile for the Reahards to apply under the Vested Rights provision as she knew of other cases where the property owners "had zoning on the property and had not expended large sums of money in bringing forward construction plans and that type of thing, and those application were denied. (Doc. 60, tr.trans. p. 194)

Lee County's expert, Dr. Gottschalk testified that the Reahards could have applied under the Vested Rights provision and that "their opportunity was the same as every other property owner in the County." (Doc. 60, tr.trans.379) Dr. Gottschalk, however, had no opinion regarding whether the Reahards would have prevailed on a vested rights application. (doc. 60,m tr.trans. p. 382)

From the testimony of the experts, it is clear to the Court that the Reahards had not expended sufficient money, nor commenced sufficient development to have prevailed under the Vested Rights provision of the statute had they applied. The Supreme Court does not require that the plaintiffs apply for administrative action that would be futile which would have been true in this case. See, *Eide v. Sarasota County*, 895 F.2d 1326, (11th Cir. 1990).

Equitable Estoppel

Chapter XIII, Procedures and Administration of the 1989 Lee Plan, (Gov. Exhibit 1(B) p.3) provides:

> In other circumstances where development expectations may conflict with the Lee Plan but judicially defined principles of equitable estoppel may override the otherwise valid limitations imposed by the Lee Plan, such expectations may be recognized by Lee County, acting by resolution of its Board of County Commisssioners, on a case-by-case basis.

The Plan sets forth no specific procedures to apply under the "Equitable Estoppel" clause. Although both Lee County and the Reahards articulate reasons why this provision is either applicable or not to the Reahards' property, these arguments are moot in that the Reahards applied under this "Equitable Estoppel" provision. (See, Pl. exh. 21). Although their application was brief, the Lee Plan sets forth no application process and the Court can only assume that the application was valid. In addition, Lee County never responded to the Reahards' application either by denying it for lack of evidence or by denying it on the merits. (tr. trans. p. 187) Therefore, the Reahards exhausted their administrative remedies under the "Equitable Estoppel" clause of the 1989 Lee Plan.

Development Order

Under both Florida Statutes and the Development Standards Ordinance, a development plan for property must be consistent with the comprehensive plan of the county.[5] According to the Lee Plan, the Reahards were restricted to building one unit on their approximate 35 acres. (tr. trans. p.

151) Therefore, to exhaust their administrative remedies, the Reahards had to obtain an amendment to the Lee Plan to develop more than one unit. (tr.trans. p. 159)

Section XIV of the Lee Plan provides for applications for amendments to the Lee Plan for property owners that the Lee Plan affects or affected. (Pl. exh. 1A) The Reahards did apply for a Plan Amendment on January 27, 1988. (Pl. exh. 30). The Plan Amendment then went for a vote before the Lee County Board of County Commisioners who denied the Reahards' request. (tr.trans. p.153) There is no other remedy in which the Reahards could have changed the Lee Plan property designation. (tr.trans. p. 158) In addition, the Reahards obtained a Development Order that was consistent with the Lee Plan and permitted them to construct one single family dwelling on their property. (tr.trans p. 185) The Court then concludes that since Lee County denied any amendment other than one single family unit of the subject property, and that the statutory law requires that any development be consistent with the Lee Plan, that the Reahards have indeed exhausted their administrative remedies for a Developmental Order.

Therefore, it is hereby ORDERED:

1. That the plaintiffs have exhausted both their administrative and judicial remedies prior to filing this action.

2.That a taking of the subject property occurred when the Lee County Comprehensive Plan was enacted causing a great diminution in the plaintiffs' investment-backed expectations.

DONE and ORDERED in Chambers, Fort Myers, Florida, this 22nd day of April, 1993.

George T. Swartz
United States Magistrate Judge

ENDNOTES

[1]Although, the plaintiff, Ann Reahard was added after the Petition for Removal was filed (Doc.9), for ease this Court will refer to both plaintiffs throughout as the addition of Ann Reahard did not impact the issue of ripeness.

[2]The Florida Supreme Court in April of 1990, subsequently ruled that "the state must pay when it regulates private property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property, thereby unfairly imposing the burden of providing for the public welfare upon the affected owner." *Joint Ventures, Inc. v. Department of Transportation*, 563 So.2d 622 (Fla. 1990). However, this decision was subsequent to the removal in the case at bar.

In its Reply to Reahard's Memorandum on Subject Matter Jurisdiction (Doc. 129), Lee County argues that the Supreme Court in the case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), held that the just compensation clause of the Fifth Amendment mandates that a state provide just compensation for confiscatory zoning regulation. This decision was decided prior to the instant case being removed to federal court. In the *First English* case, however, the Supreme Court clearly states, "[W]e limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *Id.* at 321, 2389. Therefore, the holding was limited to the facts in the *First English* case. In addition, for all practical purposes, the Reahards could not have brought the case in Florida Courts due to the ruling in *Lee*

County v. Morales, 557 So.2d 652, 656 (2nd DCA, 1990).

[3]The Reahards did apply for a determination of error which would permitted the County to re-examine the subject property to determine if the RPA classification was wrong. (tr.trans. p. 88, pl. exh. 12)) The County determined there was no error in their classification. (tr.trans. p.89)

[4]Although the plaintiffs allege that Lee County did not raise the exhaustion of the vested rights provision in an affirmative defense and have therefore waived it, the Court must consider the merits of the vested rights provision as it applies to the plaintiffs. The question of exhaustion of remedies lies within the parameters of subject matter jurisdiction and the Eleventh Circuit stated that the question of subject matter jurisdiction must be investigated whether or not it is raised by the parties.

[5]Development Standards Ordinance provides in part "in no case may the density (of a parcel of property) exceed the allowable density as set forth in the comprehensive plan or the zoning ordinance." Development Regulations (Doc. 53, exh. 5).

Florida Statute §163.3194(1) (a) provides:

> After a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such pan or element shall be consistent with such plan or element as adopted.

United States District Court
Middle District of Florida
Fort Myers Division

RICHARD REAHARD and
ANN P. REAHARD,

Plaintiffs,

vs.

LEE COUNTY, FLORIDA,

Defendent.

Case No. 89-227 Civ-FTM-10C

ORDER

THIS CAUSE being heard on the Motion of the Plaintiffs to reinstate the Final Judgement, and the Court being fully advised in the premises, and having received memoranda of law from the parties, it is hereby

ORDERED AND ADJUDGED that the previous Final Judgement of this Court dated June 6, 1991, a copy of which is attached hereto, is hereby reinstated nunc pro tunc.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 3rd day of May, 1993.

GEORGE T. SWARTZ
U. S. Magistrate

APPENDIX C

Richard REAHARD; Ann P. Reahard, Plaintiffs-Appellees,
v.
LEE COUNTY, Defendant-Appellant.

REAHARD v. LEE CTY.

No. 91-3593.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

978 F.2d 1212; 1992 U.S. App.
LEXIS 32107; 23 ELR 20369; 6

Fla. Law W. Fed. C 1371

December 8, 1992, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Middle District of Florida. Addendum to Opinion Dated August 14, 1992, Reported at 1992 U.S. App. LEXIS 18629. DISTRICT BANKRUPTCY COURT DOCKET NO. 89-227-Civ-FTM-10C. D/C Judge SWARTZ

COUNSEL: For Plaintiffs-Appellees: Garvin & Tripp, P.A., Jeffrey Richard Garvin, Theodore L. Tripp, P.O. Drawer 2040, Ft. Myers, FL 33903, (813)334-1824.

For Defendant-Appellant: John J. Renner, Asst. Lee County Attorney, P.O. Box 398, Fort Myers, FL 33902, (813)335-2236. Robert N. Reynolds, Suite 1000, One Datran Center,

9100 So. Blvd., Miami, FL 33156. Helena Schwartz, AG, Jonathan A. Glogau, Special Projects Div., 111-36 South Magnolia Drive, Tallahassee, FL 32301, (904)488-5899.

For AMICUS: of BROWARD COUNTY: Melissa P. Anderson, Governmental Center, Suite 423, 115 So. Andrews Ave., Ft. Lauderdale, FL 33301, (305)357-7600. For 1000 Friends of Florida, Inc.): Gibson & Lilly, Robin Gibson, P.O. Box 1199, Lake Wales, FL 33859. For RGMC and COTI: Thomas W. Reese, 123 Eighth Street North, St. Petersburg, FL 33701, (813)822-4084. For FLORIDA LEAGUE OF CITIES: Harris Morrison, Jr., 201 W. Park Ave., Tallahassee, FL 32302, 904-222-9684. For FLORIDA ASSOC. OF COUNTIES & FLORIDA ASSOC. OF COUNTY ATTYS: John J. Dingfelder, P. O. Box 1110, Tampa, FL 33601. For National Assn. of Home Builders - Amicus for Appellee: William H. Ethier, 15th & M. Streets, NW, Washington, DC 20005, 202/822-0359. For Florida Citrus Mutual - Amicus for Appellee: Joseph J. Gleason, V-P Staff Legal Counsel, P.O. Box 89, Lakeland, FL 33802, 813/682-1111. For Southeastern Legal Foundation, Inc. - Amicus for Appellees: G. Stephen Parker, President, Deborah A. Ausburn, The Southeastern Legal Foundation, Inc., 2900 Chamblee-Tucker Road, Building 4, Atlanta, GA 30341, 404/458-8313. For Florida Dairy Farmers, Inc., Fla. Land Council, Fl. Farm Bureau Federation & FL Cattlemen's Association - Amicus for Appellees, Hart, Fuller & Smith, PA, Marty Smith, P.O. Box 2120, Ocala, FL 32678, 904/732-9253. For Pacific Legal Foundation - Amicus for Appellees: Robin L. Rivett, Pacific Legal Foundation, 2700 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833-3501, 916/641-8888. For Defenders of Property Rights - Amicus for Appellees: Leonard A. Leo, Nancie G. Marzulla, Defenders of Property Rights, 6235 33rd St., NW Washington, DC 20015, 202/686-4197.

JUDGES: Before FAY and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

OPINIONBY: FAY

OPINION: [*1213] FAY, Circuit Judge:

The original opinion in this case is published at 968 F.2d 1131 (11th Cir.1992). However, upon further review of this matter, the court is concerned about the question of subject matter jurisdiction. We are aware that the United States magistrate judge denied Lee County's motion to dismiss for lack of ripeness, and the parties did not raise the issue on appeal. However, ripeness is a question of subject matter jurisdiction. *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n. 7 (11th Cir.1989). We always must investigate questions of subject matter jurisdiction, whether or not they are raised by the parties to the case. *Fitzgerald v. Seaboard System* R.R., 760 F.2d 1249, 1251 (11th Cir.1985).

Therefore, we supplement our original opinion to instruct the magistrate judge to revisit the question of ripeness on remand and determine [**2] whether the district court has jurisdiction over this matter. We recognize that in this case, the question of subject matter jurisdiction is quite fact specific. There is some question regarding the Reahards' efforts to secure appropriate administrative remedies. This was touched upon but not developed. Moreover, there is nothing in the record regarding the judicial remedies available in Florida state courts, or the Reahards' pursuit of those remedies. Assuming that these claims could be satisfied through adequate state judicial procedures, the Reahards have not stated a ripe federal claim under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), and there is no subject matter jurisdiction.

We instruct the magistrate judge, on remand, to develop

these factual issues fully, make relevant factual findings, and determine [*1214] whether the district court has jurisdiction over this matter.

APPENDIX D

Richard REAHARD; Ann P. Reahard,
Plaintiffs-Appellees,
v.
LEE COUNTY, Defendant-Appellant.

REAHARD v. LEE CTY.

No. 91-3593.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

968 F.2d 1131; 1992 U.S. App.
LEXIS 18629; 22 ELR 21455; 6

Fla. Law W. Fed. C 991

August 14, 1992, Decided

SUBSEQUENT HISTORY: Addendum Opinion of December 8, 1992, Reported at 1992 U.S. App. LEXIS 32107.

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Middle District of Florida. DISTRICT/BANKRUPTCY COURT DOCKET NO.
89-227-Civ-FTM-10C 10-5-89. D/C Judge SWARTZ

DISPOSITION: We VACATE the judgment and REMAND this case for new proceedings consistent with this opinion.

COUNSEL: For Defendant-Appellant: John J. Renner, Asst. Lee County Attorney, P.O. Box 398, Fort Myers, FL 33902, (813) 335-2236. Robert N. Reynolds, Suite 1000, One Datran Center, 9100 So. Blvd., Miami, FL 33156. Helena Schwartz, AG, Jonathan A. Glogau, Special Projects Div., 111-36 South Magnolia Drive, Tallahassee, FL 32301, (904) 488-5899.

For AMICUS of BROWARD COUNTY: Melissa P. Anderson, Governmental Center, Suite 423, 115 So. Andrews Ave., Ft. Lauderdale, FL 33301, (305) 357-7600. For 1000 Friends of Florida, Inc.: Gibson & Lilly, Robin Gibson, P.O. Box 1199, Lake Wales, FL 33859. For RGMC and COTI: Thomas W. Reese, 123 Eighth Street North, St. Petersburg, FL 33701, (813) 822-4084. For Florida Association of Counties and Florida Association of County Attorneys: John J. Dingfelder, P.O. Box 1110, Tampa, FL 33601. For National Assn. of Home Builders - Amicus for Appellee: William H. Ethier, 15th & M Streets, NW, Washington, DC 20005, 202/822-0359. For Florida Citrus Mutual - Amicus for Appellee: Joseph J. Gleason, V-P, Staff Legal Counsel, P.O. Box 89, Lakeland, FL 33802, 813/682-1111. For Southeastern Legal Foundation, Inc. - Amicus for Appellees: G. Stephen Parker, President, Deborah A. Ausburn, The Southeastern Legal Foundation, Inc., 2900 Chamblee-Tucker Road, Building 4, Atlanta, GA 30341, 404/458-8313. For Florida Dairy Farmers, Inc., Fla. Land Councuil, Fl. Farm Bureau Federation & FL Cattlemen's Association - Amicus for Appellees: Hart, Fuller & Smith, PA, Marty Smith, P.O. Box 2120, Ocala, FL 32678, 904/732-9253. For Pacific Legal Foundation - Amicus for Appellees: Robin L. Rivett, Pacific Legal Fondation, 2700 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833-3501, 916/641-8888. For Defenders of Property Rights - Amicus for Appellees: Leonard A. Leo, Nancie G. Marzulla, Defenders of Property Rights, 6235 33rd

St., NW, Washington, DC 20015, 202/686-4197. For Plaintiffs-Appellees: Garvin & Tripp, P.A., Jeffrey Richard Garvin, Theodore L. Tripp, P.O. Drawer 2040, Ft. Myers, FL 33903, (813) 334-1824.

JUDGES: Before FAY and BIRCH, Circuit Judges, and DYER, Senior Circuit Judge.

OPINIONBY: FAY

OPINION: [*1132]

FAY, Circuit Judge:

Appellant Lee County, a political subdivision of the State of Florida, appeals a magistrate judge's order finding that the adoption of the Lee County Comprehensive Land Use Plan resulted in a taking of Appellees Richard and Ann Reahard's property under the Fifth and Fourteenth Amendments to the United States Constitution. Because the magistrate judge misapplied the legal standard for partial takings and failed to make adequate factual findings, we VACATE the order and REMAND for new proceedings consistent with this opinion. [*1133]

I. BACKGROUND

This case concerns roughly forty acres of waterfront land located in Lee County, Florida, with direct river access to the Gulf of Mexico. These forty acres were once part of a larger parcel of approximately 540 acres that were purchased in 1944 by the parents of the plaintiff, Richard Reahard. Through the mid-1970's, the Reahard family subdivided, developed, and sold tracts of the 540 acre parcel, retaining the approximately forty acres at issue. Richard Reahard,

who inherited [**2] the site in November of 1984, sought to continue development of the site as a single-family subdivision. In December of 1984, however, the Lee County Comprehensive Land Use Plan ("Lee Plan") went into effect and classified the Reahard's property as a Resource Protection Area ("R.P.A."). This designation limited development of the parcel to a single residence, or for uses of a "recreational, open space, or conservation nature." (Pl.Ex. 9-A).

On September 1, 1989, Reahard n1 filed a complaint in the Twentieth Judicial Circuit Court of the State of Florida alleging that Lee County's designation of his property as an R.P.A. in the Lee Plan was a valid exercise of Lee County's police power but constituted a taking under sections 163.3194(4)(b) and 380.08 of the Florida Statutes, under Article X, Section 6 of the Florida Constitution, and under the Fifth and Fourteenth Amendments to the United States Constitution. Lee County answered the complaint and affirmatively alleged that Reahard failed to exhaust administrative remedies, that the claim was not ripe for adjudication, and that the claim was barred by the statute of limitations. Following the filing of a petition for removal by Lee [**3] County, the case was removed from state court to federal court.

----------Footnotes----------

n1 Richard Reahard's wife, Ann Reahard, was added as a party after the filing
of this action.

----------End Footnotes----------

The parties agreed to have the matter heard before a United States magistrate judge. n2 The issues of liability and damages were bifurcated. The non-jury trial on liability, or on

whether a taking had occurred, began on November 26, 1990 and concluded on November 28, 1990.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 Parties may consent to have a United States magistrate judge "conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves," pursuant to 28 U.S.C. @ 636(c)(1).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

During the trial numerous witnesses were called, including Richard Reahard, representatives of Lee County, the Florida Department [**4] of Environmental Regulation ("DER"), and the Army Corps of Engineers, land use planners and consultants, and property appraisers. Evidence was introduced concerning the initial title acquisition of the subject property, e.g., (R10:60, 95-96), the property's history of subdivision, sale, and development, e.g., (R10:96-98, 117, 120-23), the record of permitting, e.g., (R10:82, 102, 125-26; Pl.Ex. 17, 22), how and when Reahard inherited the land, e.g., (R10:60, 82), the topography and extent of the property, e.g., (R10:65-67), the site's history of zoning and regulation, e.g., (Pl.Ex. 9-A; Def.Ex. 1-A), value appraisals after the enactment of the Lee Plan, e.g., (R11:274), development of similarly designated "wetland" areas, (R11:215-16), and the Reahard's investment expectations, e.g., (R10:87).

Much of this evidence was in dispute n3 and nearly all of it relevant to whether a taking had occurred. Despite the complexity of the evidence, however, the magistrate judge, in an order issued on January 16, 1991, limited his factual findings to the following:

----------Footnotes----------

n3 For example, the parties disputed whether DER would have issued permits for development, the extent to which the R.P.A. classification affected the reasonable economic use of the land, and the value of the property after the enactment of the Lee Plan.

----------End Footnotes----------

[**5]

1. No cause of action arose in the case until January 31, 1989, when Lee County finally denied Plaintiff's application for plan amendment, and therefore, the four year Statute of Limitations did not begin running until that date.
[*1134]

2. There was no vesting of any property rights due to any official affirmative act or omission on the part of Defendant, Lee County, or its agents, such as would have entitled Plaintiffs to exemption from the operation of the Lee County Comprehensive Land Use Plan, hereinafter referred to as the "Lee Plan." Because there was no official affirmative acts or omissions on the part of Lee County, any application under the vested rights provision of the Lee Plan would have been futile.

3. Plaintiffs have filed an application for amendment to the Lee Plan, an application for administrative determination of error, and an application under the minimum use or single family residence provision of the Lee Plan and, as a result, have exhausted all administrative remedies.

4. Defendant, Lee County, upon application by the Plaintiffs, has entered a development order permitting the Plaintiffs to place one (1) single family unit on the approximately

40-acre tract which is [**6] the subject of this litigation. Development of some of the property could have occurred were it not for the enactment of the Lee Plan and subsequent development order.

5. As a result of the adoption of the Lee Plan, there was a substantial deprivation of the value of Plaintiffs' property resulting in a taking of Plaintiffs' property with the loss of use to Plaintiffs dating back to the effective date of the County's adoption of the Lee Plan on December 21, 1984.

(R5:56-1-3).

Immediately after entry of these findings, Lee County appealed directly to this court. n4 The appeal was dismissed as premature pending determination of damages, which subsequently went to trial before a jury on May 7, 1991. Two weeks later, on May 21, 1991, the jury returned a verdict in favor of the Reahards for $ 700,000, plus interest at 6.07% accrued from December 21, 1984. The final judgment was amended on June 6, 1991 to award interest at 12% and to require the Reahards to execute and deliver to Lee County a fee simple deed conveying their interest in the subject property to Lee County.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 Under 18 U.S.C. @ 636(c)(3), "an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court."

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[**7]

Lee County once again appealed directly to this court. We issued an order advising the parties that we would await the Supreme Court's review of *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 404 S.E.2d 895, cert. granted, U.S. ——, 112 S. Ct. 436, 116 L. Ed. 2d 455 (1991), before deciding this appeal. As the Supreme Court has recently ruled in *Lucas v. South Carolina Coastal Council*, U.S. ——, 112 S. Ct. 2886, L. Ed. 2d —— (1992), reversing, 304 S.C. 376, 404 S.E.2d 895 (1991), we address the present appeal. n5

----------Footnotes----------

n5 Although we awaited the release of *Lucas*, the Court left open how the categorical takings rule set forth in its opinion applies to situations in which a part of a landowner's property is rendered unusable by a regulation. See U.S. at —— n. 8, 112 S. Ct. at 2895 n. 8 ("Such an owner [whose land diminishes in value by 95%] might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, 'the economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally. It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full." (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631 (1978)).

----------End Footnotes----------

[**8]

II. DISCUSSION

The magistrate judge's order of January 16, 1991 cannot

stand because it misapplies the legal standard regarding partial takings and wholly fails to set forward factual findings necessary to support a decision that a taking has occurred.

Recently, in *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir.1990), cert. denied, U.S. ——, 111 S. Ct. 1073, 112 L. Ed. 2d 1179 (1991), we identified four types of taking challenges that a land owner [*1135] may bring: (1) just compensation claims; (2) due process takings claims; (3) arbitrary and capricious due process claims; and (4) equal protection claims. Id. at 720. This challenge falls within the first category: a claim for just compensation. In *Eide*, we noted that a just compensation claim, as opposed to the other types of claims, does not seek "an invalidation of the local authority's application of the regulation," id. at 721, but simply monetary compensation for the value taken. In his complaint, Reahard conceded that "the action of Lee County in classifying Plaintiff's land as Resource Protection Area is a valid exercise of the [**9] police power of Lee County." n6 (R1:1 "Complaint and Demand for Jury Trial" at 3). He asserts, however, that the R.P.A. designation sufficiently interfered with his reasonable investment-backed expectations that monetary compensation is warranted.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n6 The Reahards now argue that "there is no evidence that the proposed development of this property by Mr. and Mrs. Reahard would cause any substantial harm [sic] the public, generally, or the environment, in specific," Brief for Appellees at 15, thus raising the factual issue of whether the R.P.A.'s application substantially advanced legitimate state interests. We will not consider this issue as it is raised for the first time on appeal. *Pierre v. United States*, 525 F.2d 933, 936 (5th Cir.1976).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The question inherent in a "just compensation" claim is whether the regulation goes so far as to be a taking. n7 See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67, 67 L. Ed. 322 L. Ed. 322 (1922) ("The general [**10] rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). Admittedly, there has been much confusion as to when a regulation goes too far in a partial takings case. In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), the Supreme Court recognized that it has been "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* at 124, 98 S. Ct. at 2659. Instead, the Court held that takings decisions depend largely upon the particular circumstances in each case and that each case is to be decided on an ad hoc, factual basis. *Id.*

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - -

n7 The threshold question, of course, is whether the just compensation claim is ripe for review. As we made clear in Eide,

> in order for such a claim to be ripe for adjudication, the landowner must overcome two hurdles: the final decision hurdle and the just compensation hurdle. The landowner must obtain a final decision regarding the application of the zoning ordinance or regulation to his or her property and utilize state procedures which provide for obtaining just compensation. The final decision requirement includes a requirement that the property owner seek variances from the applicable

> regulations. The reason for the final decision requirement is that one of the factors significant to the adjudication of a just compensation claim is "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." This impact and interference cannot be ascertained until the local authority has determined the nature and extent of the development that will be permitted. In addition to the final decision requirement, a Fifth Amendment just compensation claim is not ripe until the landowner has pursued the available state procedures to obtain just compensation.

908 F.2d at 720-21 (citations omitted).

Here, the magistrate judge found that the Reahards exhausted all administrative remedies prior to their just compensation claim. (R5:56 at 2).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

[**11]

The *ad hoc* inquiry requires no more than an application of the law to the peculiar facts. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), the Supreme Court restated two tests to be used in analyzing takings claims. The first test is whether a particular regulation substantially advances a legitimate state interest. 483 U.S. at 834, 107 S. Ct. at 3147; *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980). If the regulation does not substantially advance a legitimate state interest, it can be declared invalid. The second test is whether a regulation denies an owner economically viable use of his property. 483 U.S. at 834, 107 S. Ct. at 3147; 447 U.S. at 260, 100 [*1136] S. Ct. at

2141. In *Nollan*, the Court found that the California Coastal Commission's imposition of an access-easement condition failed the first test and thus violated the takings clause. 483 U.S. at 835-39, 107 S. Ct. at 3147-50. [**12] The Court did not reach the second test.

Here, the first test set forth in *Nollan* is bypassed because a claim for "just compensation" (the first type of claim identified in *Eide*) necessarily involves a regulation that substantially advances a legitimate government interest. Just compensation claims admit and assume that the subject regulation substantially advances a legitimate government interest; the validity of the regulation is not at issue. Thus, given no claim that state common law would permit particular use restrictions without compensation, the only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of his property. See *Eide*, 922 F.2d at 721; see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S. Ct. 2862, 2874, 81 L. Ed. 2d 815 (1984) (recognizing that governmental action "so complete as to deprive the owner of all or most of his interest" can amount to a taking) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S. Ct. 357, 359, 89, 89 L. Ed. 311 L. Ed. 311 (1945)).

In order to resolve [**13] the question of whether the landowner has been denied all or substantially all economically viable use of his property, the factfinder must analyze, at the very least: (1) the economic impact of the regulation on the claimant; and (2) the extent to which the regulation has interfered with investment-backed expectations. *Bowen v. Gilliard*, 483 U.S. 587, 606, 107 S. Ct. 3008, 3019, 97 L. Ed. 2d 485 (1986); *Hodel v. Irving*, 481 U.S. 704, 713-14, 107 S. Ct. 2076, 2081-82, 95 L. Ed. 2d 668 (1986); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 516, 107 S. Ct. 1232, 1258, 94 L. Ed. 2d 472 (1986); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348-49,

106 S. Ct. 2561, 2565-66, 91 L. Ed. 2d 285 (1986); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S. Ct. 3164, 3171, 73 L. Ed. 2d 868 (1981); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75, 100 S. Ct. 383, 389-390, 62 L. Ed. 2d 332 (1979); *Penn Central*, 438 U.S. at 124, 98 S. Ct. at 2659; [**14] see *Baytree of Inverrary Realty Partners v. City of Lauderhill*, 873 F.2d 1407, 1410 (11th Cir.1989). This analysis must be explored in light of developing case law that has shaped and defined the meaning of these factors.

In the instant case, the magistrate judge, serving as factfinder, n8 did not analyze the factors noted above, nor did he set forth factual findings necessary for such an analysis. In this context, a proper takings analysis would address a number of questions. In this case, those questions are: (1) the history of the property — when was it purchased? How much land was purchased? Where was the land located? What was the nature of title? What was the composition of the land and how was it initially used?; (2) the history of development — what was built on the property and by whom? How was it subdivided and to whom was it sold? What plats were filed? What roads were dedicated?; (3) the history of zoning and regulation — how and when was the land classified? How was use proscribed? What changes in classifications occurred?; (4) how did development change when title passed?; (5) what is the present nature and extent of the property?; (6) what were [**15] the reasonable expectations of the landowner under state common law?; (7) what were the reasonable expectations of the neighboring landowners under state common law?; and (8) perhaps most importantly, what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation? Once such facts are determined, an application of these facts under the Penn Central multifactor inquiry would follow. Here, the magistrate judge simply concluded, without any findings or

analysis, that "as a result of the adoption of the Lee Plan, there was a substantial [*1137] deprivation of the value of Plaintiffs' property resulting in a taking." (R5:56 at 2).

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n8 We note, of course, that had this matter been before a jury, the relevant inquiry would have concerned whether the instructions properly charged the jury.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

Given the lack of both factual findings and a takings analysis in accord with case precedent, we VACATE the judgment and REMAND this case for new proceedings consistent with this opinion. [**16] n9

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n9 During the pendency of this appeal, Lee County filed a motion to dismiss based upon mootness noting that it had filed a condemnation case in state court. Our inquiry resulted in being advised that the condemnation case was "pending." We suggest that the magistrate judge make appropriate inquiry regarding such litigation. If such an action has been completed, this case would be moot.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - -

APPENDIX E

United States District Court
MIDDLE DISTRICT OF FLORIDA

AMENDED JUDGEMENT IN A CIVIL CASE

RICHARD REAHARD and ANN REAHARD

V.

LEE COUNTY, a political
subdivision of the State of Florida

CASE NUMBER: 89-227-CIV-FTM-10(C)

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the amount to be paid by the defendant, LEE COUNTY, to the plaintiffs, RICHARD REAHARD and ANN REAHARD, as full compensation for the property taken is $700,000.00 plus interest accrued from 12/21/84 until 5/13/91, at the rate of 12%.

Plaintiffs, upon tender of the amount of this judgement shall execute and deliver to Defendant, LEE COUNTY, a fee

simple deed conveying their interest in the subject property to the Defendant.————————

June 6, 1991

DAVID L. EDWARDS
Clerk

FILED
MAR 20 1995
OFFICE OF THE CLERK

No. 94-1384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD REAHARD AND ANN P. REAHARD,

Petitioners,

v.

LEE COUNTY, FLORIDA,

Respondent.

On Petiton for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a claimant states a valid regulatory takings claim under the Fifth Amendment without first obtaining a final decision how the regulation will be applied to his property and thereafter being denied compensation under available state procedure?

LIST OF PARTIES

Petitioners, Richard Reahard and Ann P. Reahard are residents of Lee County, Florida. Respondent, Lee County is a political subdivision of the State of Florida.

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APPENDIX

Appendix A - U.S. District Court, Middle District of Florida, Fort Myers Division, Order dated March 21, 1990 . . . . . 1a

Appendix B - U.S. District Court, Middle District of Florida, Fort Myers Division, Order dated June 16, 1993 . . . . . 4a

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

RICHARD REAHARD and ANN P. REAHARD,
Petitioners,

v.

LEE COUNTY, FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

The respondent, Lee County, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners Richard Reahard and Ann P. Reahard.

OPINION BELOW

The Eleventh Circuit Court of Appeal reversed the judgment of the trial court, which held that the application of Lee County's comprehensive land use plan to Petitioners' 40 acre mangrove wetland constituted a regulatory taking under the Fifth Amendment and Article X, Section 6 of the Florida Constitution, on ripeness

grounds. The Court's opinion is reported at 30 F.3d 1412 (11th Cir. 1994) and reproduced in the Appendix to the Petition for Certiorari (App. A).

FACTUAL BACKGROUND

In 1944, Richard Reahard's parents purchased a 540± acre tract of land in Lee County, Florida for $1,250.00. Portions of raw land were sold, a motel was built on part of the tract, a real estate office built on another part, dirt was sold as fill, a single family subdivision was developed on a portion, Reahard's parents built a home for a residence and another for rental income and Richard Reahard built his resident on a portion. The last clearing and filling of a significant nature was done prior to 1975. As of 1975, there remained only a 40± acre tract of submerged, mangrove forested wetlands. The subject parcel is a "pristine wetlands area with few environmental impacts on it" (R10-130-11 Amended Order of Taking). No permits were ever obtained to develop the wetland parcel from the federal, state, or local authorities and there was no development underway since 1975 (RX-125).

On November 16, 1984, Lee County adopted the Lee County Comprehensive Plan. The comprehensive plan was the culmination of more than a year of public meetings, workshops, and hearings during which more than 90 days of public hearing and meetings were held. One of the eight concepts that formed the basis of the comprehensive plan was the protection of natural resources. The County Commission adopted a policy to conserve, manage, and protect natural resources. The legislative policy to protect environmentally critical wetlands was implemented by the

adoption of the Resource Protection Area ("RPA") land use classification applicable to wetlands. The RPA permitted very low density residential use of wetlands - one dwelling unit per forty acres.[1]

On November 30, 1984, Petitioner Richard Reahard inherited the 40± acre wetland. There is no dispute that the property is "a pristine wetlands area" (R10-130-11, Amended Order of Taking on Remand) and properly classified as Resource Protection Area.

JURISDICTION

Petitioners seek to invoke the discretionary jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions cited by Petitioners, Respondent submits the following to this Court:

Article X, Section 6(a) of the Florida Constitution provides in pertinent part: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner..."

STATEMENT OF THE CASE

On September 1, 1989, without first obtaining a final decision how the regulation would be applied to their parcel, Petitioners filed suit in Florida Circuit Court

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[1]Petitioners misstate that Reahards' property is the only property in Lee County designated as Resource Protection Area (Petition for Writ p.10). Approximately 140 square miles of wetland acres are so designated in Lee County (D. Ex. 3).

alleging the application of the RPA land use classification to their 40± acre mangrove wetland constituted a regulatory taking of their property in violation of the Fifth Amendment to the United States Constitution and Article X, Section 6 of the Florida Constitution. Lee County answered the Complaint alleging failure to exhaust administrative remedies, that the claim was not ripe and the statute of limitations bars the claim. A petition to remove the case to federal court was filed by Lee County and Petitioners consented to removal (R1-3; R10-130-13).[2] Lee County moved to strike Reahards' claim for attorney's fees and demand for jury trial. The trial court denied the motion on the ground the complaint asserts a state inverse condemnation claim as well as a federal constitutional claim, and Florida inverse condemnation law permits jury trial and attorney fees (R1-9). After the case was filed and in order to cure the obvious finality defect, Reahard applied for a determination to develop a 127 lot single family home subdivision on the 40± acre wetland. A determination was made that four homes could be built on portions of the tract. Reahard appealed this determination to the Lee County Commission. On September 19, 1990, the Lee County Commission rendered its final decision regarding the application of the RPA to Reahards' property and approved development of a single family home on the site.

The case was tried before a Magistrate on the issue of whether a taking occurred as a matter of law. The

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[2]Petitioners assert they were prevented from pursuing the available state court remedy because Lee County removed the case to federal court. In addition to omitting the fact that Petitioners consented to removal, Petitioners offer no authority that removal precluded Petitioners from pursuing a state court remedy.

Magistrate concluded the development approval of one single family home constituted a taking of property (R2-56). The Magistrate Judge concluded, without any findings or analysis, that as a result of the mere adoption of the Lee Plan in 1984, there was a substantial deprivation of the value of Plaintiffs' property resulting in a taking. Lee County appealed the order finding a taking but the appeal was dismissed as premature and trial set to determine the amount of compensation.

The issue of compensation was tried before a jury in May, 1991. Despite not possessing, or even applying for any development approvals necessary to destroy a 40± acre pristine wetland, and over Lee County's objections, Reahard presented a valuation case to the jury based upon speculation that a 24-126 lot subdivision could be developed upon the filled 40± acre mangrove wetland. A verdict of $700,000 was returned and the Magistrate entered judgment for $700,000 plus interest at 6.07% accrued from December 21, 1984, the date the comprehensive plan became effective (R6-93). Reahard filed a motion to amend the judgment to apply the interest rate of 12% which is the statutory rate under Section 55.03(1), Florida Statutes (R6-95). The Magistrate amended the judgment to include the 12% interest rate applicable to Florida state court judgments (R10-97). Lee County appealed the order of liability and the Amended Final Judgment on June 21, 1991.

The Eleventh Circuit Court of Appeals vacated the judgment because the Magistrate misapplied the legal standard applicable to partial takings and wholly failed to make adequate factual findings necessary to support the conclusion that a taking had occurred, *Reahard v. Lee*

County, 968 F.2d 1131 (11th Cir. 1992) (App. D). The Court remanded the case back to the Magistrate for new proceedings consistent with the Court's opinion.

On September 8, 1992, the Magistrate called a status conference at which time the Magistrate announced that "the ruling of the Court of Appeals hasn't changed my opinion one iota" (R18-120). The Eleventh Circuit Court of Appeals issued a supplemental opinion instructing the Magistrate to revisit the issue of ripeness [*Reahard v. Lee County*, 978 F.2d 1212 (11th Cir. 1992)]. On January 22, 1993, the judgment of the Appeals Court was filed in the trial court.

On remand, the Magistrate entered his Amended Order of Taking Following Remand (R10-130). The Magistrate concluded that Reahards' 126 lot subdivision would not likely be permitted but a 41 lot subdivision plan would have "surfaced" and probably would be permitted which would greatly increase the property's value (R10-130). The Magistrate further concluded that the federal takings claim was ripe because Florida did not provide a compensation remedy on the date of removal in October, 1989. Even if the Magistrate correctly disregarded Florida's inverse condemnation jurisprudence, the takings claim was not ripe in October, 1989 for lack of finality. While the Magistrate noted that Reahards obtained a development order consistent with the Lee Plan which permitted construction of a single family home, thereby obtaining a final decision as to the applicability of the regulation to their property, the order did not include the date the final decision was made. This date was September 19, 1990 (Plaintiff's Ex. 22). Thus, any alleged taking under the Fifth Amendment accrued, under the finality

prong, on September 19, 1990. Neither the date suit was filed nor the date the case was removed to federal court are relevant to the determination whether a Fifth Amendment takings claim is ripe for adjudication.

Subsequent to the entry of the Amended Order of Taking Following Remand, the Magistrate entered an Order Reinstating the Final Judgment over the objections of Lee County (R10-132). Lee County moved to alter or amend the final judgment specifically objecting to the award of prejudgment interest and its calculation at 12%, the statutory rate under Florida statute, on the basis that if there was no Florida compensation remedy for purposes of ripeness of the federal taking claim, how can Florida remedies apply?[3] (R10-135) The Magistrate held that in April 1990, "subsequent to removal," the Supreme Court of Florida confirmed the availability of a Florida inverse condemnation remedy and the Magistrate adjudicated a Florida inverse condemnation claim as well as a federal Fifth Amendment taking claim (R10-143).

Once again Lee County appealed to the Eleventh Circuit Court of Appeals. The Court reversed the decision of the Magistrate on the grounds the federal taking claim was not ripe for adjudication due to the existence of an adequate state compensation remedy prior to the date of the alleged taking.

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[3]Compounding the error, as well as the interest, the Magistrate found the taking occurred upon the enactment of the comprehensive plan on December 21, 1984 awarding prejudgment interest from that date. Of course a final decision as to how the comprehensive plan would be applied to Petitioners' property was not rendered until September 19, 1990.

SUMMARY OF ARGUMENT

Federal courts are courts of limited jurisdiction whose subject matter jurisdiction is founded upon Article III. In order for a federal court to have subject matter jurisdiction to adjudicate a Fifth Amendment taking claim, there must first be a violation of the Fifth Amendment. When the application of a regulation is challenged as an uncompensated taking, there is no violation of the Fifth Amendment until a final decision is rendered as to how the regulation will be applied and the claimant has pursued and been denied compensation under available procedure.

Petitioners' suit alleged an uncompensated taking of property under Florida law and the Fifth Amendment. This prematurely filed suit was improvidently removed to federal court with Petitioners' consent. At the time the final decision regarding the regulations application to Petitioners' property was rendered, any doubt as to the existence of a Florida inverse condemnation remedy was removed. Until Petitioners pursue their state inverse condemnation remedy and are denied compensation, there is no Fifth Amendment taking and no basis for federal jurisdiction.

REASONS FOR DENYING THE WRIT

I. THIS COURT'S DECISION IN *LUCAS* DID NOT IMPLICITLY ABROGATE THE REQUIREMENTS OF A FINAL DECISION AND DENIAL OF COMPENSATION AS THE *SINE QUA NON* OF A

FIFTH AMENDMENT REGULATORY TAKING CLAIM.

In order to state a cause of action for a Fifth Amendment regulatory taking which may be adjudicated in federal court, a claimant must fulfill two prerequisites.[4] First, the claimant must show that he has obtained a "final and authoritative determination of the type and intensity of development legally permitted on the subject property" *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). Second, if a State provides an adequate procedure for seeking compensation, a claimant cannot state a Fifth Amendment taking claim in federal court until he has used the procedure and been denied just compensation. This latter requirement is premised upon the fact that "the Fifth Amendment proscribes takings without just compensation, [and] no constitutional violation occurs until just compensation has been denied" *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 n. 13.

While "ripeness" may be premised upon prudential concerns in other contexts, in the context of Fifth Amendment regulatory taking jurisprudence, it is premised upon the substantive constitutional principle embodied in the Fifth Amendment's Just Compensation Clause. The final decision requirement "is compelled by the very nature of the inquiry required by the Just Compensation Clause" and is concerned with "whether the initial decision maker

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[4]Contrary to Petitioners' characterization of these prerequisites as "procedural requirements," finality and denial of compensation are necessary prerequisites for the accrual of a Fifth Amendment taking claim.

has arrived at a definitive position on the issue that inflicts an actual, concrete injury" *Williamson*, 190, 194. Moreover, there is simply no constitutional violation until just compensation has been denied *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.21 (1984).

Petitioners argue that this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886 (1992) impliedly receded from the precedent of *Williamson, supra.*, *MacDonald, supra., Ruckelshaus, supra.* and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) and altered Fifth Amendment jurisprudence by abrogating the prerequisites of finality and denial of just compensation. For this remarkably broad assertion, Petitioners rely upon an excerpt from the *Lucas* text dealing with a special permit procedure made available after the case was argued before the South Carolina Supreme Court.

This Court's decision in *Lucas* does not constitute a reversal from *Williamson*, *MacDonald*, or *Penn Central*, nor does it have any bearing on whether Petitioners had an adequate state compensation remedy available at the time a final decision was rendered. On the contrary, this Court's determination that *Lucas'* temporary taking claim was ripe is consistent with *Williamson*, *MacDonald*, and *Penn Central*.

In *Lucas*, Lucas pursued and was denied compensation through state court. Lucas met the prerequisite of being denied compensation when the South Carolina Supreme Court denied his claim on the merits. Additionally, there was no dispute as to how the 1988 act would be finally applied to Lucas' property - no development was permitted nor was there any avenue by

which to obtain any development approval. For purposes of stating a temporary taking claim due to the application of the 1988 act to his property, Lucas stated a ripe Fifth Amendment regulatory taking claim. The late-created special permit procedure made available after the case was before the South Carolina Supreme Court, by a 1990 statutory amendment, could not undo the fact that the final application of the 1988 act denied any development rendering the property valueless and useless for at least a two year period.

For purposes of stating a temporary regulatory taking claim under the Just Compensation Clause, Lucas stated a ripe claim by meeting the prerequisites of finality and denial of compensation. Even though Lucas stated a claim ripe under the Fifth Amendment, the Court could have exercised its discretion under "prudential ripeness" and declined to hear the case until Lucas pursued the late-created special permit. Conversely, if there is no final decision and denial of compensation in state court, there is no violation of the Just Compensation Clause. Absent a federal constitutional violation, there is no basis for federal jurisdiction.[5] Contrary to Petitioners' argument, there is no basis for prudential or discretionary federal jurisdiction when a claimant asserting a Fifth Amendment regulatory taking claim does not meet the prerequisites of finality and denial of compensation.

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[5]Federal courts are courts of limited jurisdiction and subject matter jurisdiction is a requirement of Article III *Insurance Corp. Of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

II. THE EXISTENCE OF A COMPENSATION PROCEDURE UNDER FLORIDA LAW PRECLUDES PETITIONERS' FROM ASSERTING A FIFTH AMENDMENT TAKING CLAIM IN FEDERAL COURT.

It has been said that ripeness is "peculiarly a question of timing" *Thomas v. Union Carbide Agricultural Products, Co.*, 473 U.S. 568, 580 (1985). This is particularly true in the context of Fifth Amendment takings claims.

In September, 1989, Petitioners filed suit alleging the application of the Lee County land use plan to their mangrove wetland constituted a taking without compensation in violation of the Florida and United States Constitutions.[6] They did so prior to obtaining a final decision as to how the regulation will be applied to their property. A final, authoritative determination of the intensity of development permitted on the property is an "essential prerequisite" to a justiciable Fifth Amendment taking claim *MacDonald, supra.* at 348. Petitioners' Fifth Amendment claim was unripe for lack of finality and premature. Moreover, Florida law requires finality and pursuit of available variances before a Florida inverse

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[6]Shortly after the filing of this premature suit, Lee County, with the consent of Petitioners, removed the suit to federal court. Neither Lee County nor the Petitioners appreciated the inherent jurisdictional defect that existed in pursuing a state compensation claim along with a Fifth Amendment taking claim. This defect went unnoticed by the trial court which denied Lee County's motion to strike the prayer for jury trial and attorney's fees on the ground the complaint states both federal constitutional and state law claims and under Florida inverse condemnation law, jury trial and attorney's fees are permitted. (Appendix A to Respondent's Response.)

condemnation claim becomes ripe *Martinez v. Bolding*, 570 So.2d 1369, 1371 (Fla. Dist. Ct. App. 1990), *review denied* 581 So.2d 163 (Fla. 1991); *Glisson v. Alachua County*, 558 So.2d 1030 (Fla. Dist. Ct. App. 1990) *review denied* 570 So.2d 1304 (Fla. 1990). Petitioners did not obtain a final decision until September 19, 1990 when the Lee County Board of County Commissioners issued the development order for a single family home. That is the operative date for takings analysis, as it was on that date the land use plan was definitively applied to Petitioners' property. Prior to that date, neither the state inverse condemnation claim nor the Fifth Amendment taking claim accrued. As this Court noted in *Williamson, supra.* at 194 "all that is required [under the Fifth Amendment] is that a 'reasonable, certain and adequate provision for obtaining compensation' exists at the time of the taking" (citations omitted).

Prior to September 19, 1990, the date of the final decision, no less than the Florida Supreme Court in *Joint Ventures, Inc. v. Department of Transp.*, 563 So.2d 622 (Fla. 1990) reconfirmed the existence of Florida's inverse condemnation remedy previously recognized in *Palm Beach County v. Tessler*, 538 So.2d 846 (Fla. 1989) (recognized inverse condemnation when government action causes a taking of property rights without physical appropriation).

Since Florida provided an adequate procedure by which Petitioners could seek compensation, until Petitioners have been denied compensation, there is no violation of the Just Compensation Clause.

On September 19, 1990, Petitioners obtained the final decision necessary to state a claim for inverse condemnation under Florida law and to satisfy the finality

requirement of *Williamson*. Petitioners had an available state court compensation remedy to pursue on September 19, 1990[7] which renders a Fifth Amendment taking claim unripe until compensation is denied.

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[7]The Magistrate not only acknowledged the existence of a state inverse condemnation remedy, he adjudicated it and awarded prejudgment and post-judgment interest at the Florida statutory rate since Petitioners prevailed on their state compensation claim (Appendix B to Respondent's Response).

CONCLUSION

Petitioners' argument is subtly couched so as to appeal to the Court's sense of equity and mischaracterizes this case as a classic example of how "procedural requirements" make it virtually impossible for a claimant to vindicate his Fifth Amendment rights. A myopic reading of one sentence in *Lucas* serves as the basis for Petitioners' argument that this Court impliedly modified the fundamental principle embodied in the Fifth Amendment Taking Clause that unless compensation is denied, there is no constitutional violation. Petitioners invite this Court to reverse the precedent of *Penn Central*, *Williamson*, and *MacDonald* to fashion a rule that will permit a claimant to assert a Fifth Amendment taking claim without obtaining a final decision how the regulation will be applied to his property and without the claimant being denied compensation. This invitation should be denied not only because such a rule would expand the Fifth Amendment taking clause beyond recognition, it would also erode the precept that federal courts are courts of limited jurisdiction.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RICHARD REAHARD,

Plaintiff,

-vs- CASE NO. 89-227 CIV-FtM-10(C)

LEE COUNTY,

Defendant.
_____/

ORDER

Plaintiff brings this action for inverse condemnation against the defendant Lee County, Florida. Plaintiff alleges that Lee County precluded him from developing 35 acres of waterfront property which he owns in Lee County by classifying the property as a "resource protection area." The County's action, contends plaintiff, amounts to a taking without compensation and violates the fifth and fourteen amendments of the United States Constitution, the Florida Constitution, and Florida Statute §163.3194(4)(b) and §380.08. Two motions are presently before the Court.

I. Defendant moves either to dismiss plaintiff's complaint for failure to state a claim or to obtain a more definite statement. Defendant also seeks to strike plaintiff's

claim for attorney's fees and his demand for a jury trial. Plaintiff has responded. Defendant's motion is due to be denied.

Plaintiff's complaint states a claim of inverse condemnation: plaintiff alleges that Lee County's classification of plaintiff's property precludes all economically reasonable use. Moreover, the Court does not find that a more definite statement is required in order for defendant to form a responsive pleading.

Plaintiff's claim for attorney's fees and his demand for a jury trial also should remain. The complaint appears to assert both federal constitutional as well as state law claims; and under state law, plaintiff has a right to a jury trial on the question of what constitutes just compensation. Department of Agriculture & Consumer Services v. Mid-Florida Growers, Inc., 521 So.2d 101 (Fla. 1988). Florida law also provides attorney's fees may be awarded in an inverse condemnation case. County of Volusia v. W.R. Pickens, 435 So.2d 247 (Fla. 5th DCA 1983).

Accordingly, defendant's motion to dismiss and to strike is DENIED.

II. Plaintiff moves to amend his complaint to add his wife, Ann P. Reahard, as a party. Defendant has stipulated to the addition of Ms. Reahard. Plaintiff has not submitted a new pleading incorporating his amendments as required by Rule 4.01, M.D. Fla. Rules.

Accordingly, plaintiff's motion to amend his complaint is GRANTED, and Ann P. Reahard shall be deemed to be jointed as a party plaintiff as of the date of this Order.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 21st day of March, 1990.

WILLIAM TERRELL HODGES
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RICHARD REAHARD, et al.,
Plaintiffs,
vs. CASE NO. 89-227-CIV-FTM-23D

LEE COUNTY,
Defendant.
_____/

ORDER

This Cause is before the Court on the defendant's Motion to Alter or Amend Judgment (Doc. 135). The Court has carefully reviewed the file and the submissions of the parties and has determined that the above motion must be decided prior to the appeal being completed.

According to the Motion, the County raises the following issues: a) that this Court is prohibited from reinstating the previous final judgment because the Court of Appeals vacated it and therefore it is a nullity; and b) this Court erred in awarding prejudgment interest at the rate of 12% because the plaintiffs' had no state court remedy and the Federal Statutes upon which this cause is based do not provide for prejudgment interest at the rate of 12%. The plaintiff argues that this Court is able to reinstate the final judgment and award prejudgment interest at the rate of 12%.

The Court is unpersuaded by the defendant's arguments. The Eleventh Circuit Court of Appeals remanded this matter stating this Court failed to make adequate factual findings. Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992) The Court has now made the factual finding required by the mandate which were consistent with the previous judgment and were based on the same factual evidence presented to the Court in the original non-jury trial. The Court finds no reason to hold another jury trial on damages as it would only be duplicative of the previous jury trial, thwart judicial economy and substitute a new jury's verdict with that of the previous jury.

Regarding the question of prejudgment interest, at the time that the case was removed on October 5, 1989, the defendant is correct that in state court, a zoning change did not give rise to a cause of action in damages for inverse condemnation. See, Amended order of Taking Following Remand (Doc. 130) However, shortly thereafter in April of 1990, subsequent to the removal, the state of Florida did recognize a cause of action for damages in inverse condemnation cases involving zoning changes. Id. Therefore, at the time that the judgment was entered in this matter, a cause of action existed in Florida. Florida does award prejudgment interest in inverse condemnation cases. See, County of Volusia v. Pickens, 439 So.2d 276 (5th DCA 1983). Plaintiffs brought this action under both the Constitution of the United States and the Constitution of the State of Florida.

Therefore, it is hereby ORDERED:

That the Motion to Alter or Amend Judgment (Doc. 130) is hereby DENIED.

DONE AND ORDERED in Chambers, Fort Myers, Florida, this 16th day of June, 1993.

GEORGE T. SWARTZ
UNITED STATES MAGISTRATE JUDGE

(3)

Supreme Court, U.S.
FILED
MAR 20 1995
OFFICE OF THE CLERK

No. 94-1384

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RICHARD REAHARD AND ANN P. REAHARD,

Petitioners,

v.

LEE COUNTY, FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The National Association of Home Builders ("NAHB") has received the written consent of the parties to file this brief as amicus curiae in support of the Petitioner and have filed the letters of consent with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The NAHB represents 180,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has been before this Court as an amicus curiae in support of the property owner in prior "takings" cases involving governments' land use decisions. Dolan v. City of Tigard, 114 S.Ct. 2309 (1994); Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992); Yee v. City of Escondido, 112 S.Ct. 1522 (1992); Nollan v. California Coastal Commn., 483 U.S. 825 (1987);[1] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986); Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985); San

[1]The NAHB brief was cited approvingly in this Court's Nollan opinion, 483 U.S. at 840.

Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

The just compensation clause serves as a vital shield against oppressive governmental land use regulation. It is of paramount importance to this amicus and its members. The actual, as opposed to merely theoretical, availability of an appropriate constitutional remedy for the governmental action that results in a taking is critical to the livelihood of private landowners who either 1) have lost all reasonable economic use of their property solely in order to serve the broader public (i.e., governmental) interests, or 2) are otherwise faced with overreaching governmental requirements that fail to substantially advance legitimate governmental interests. The former type of governmental imposition is presented in this case by Lee County's refusal to allow the Reahards to develop their land within the bounds permitted by law.

Whether the preservation of the Reahards' land as open space is a legitimate or even worthwhile goal is irrelevant.[2] The sole question presented is whether this preservation burden--unquestionably a public benefit--should be shouldered by the Reahards without Lee County providing just compensation.

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[2] Fairness and justice dictate that the public should pay for the cost of the land that is preserved for the benefit of the public, rather than forcing some people alone to bear these public burdens. See Andrus v. Allard, 444 U.S. 51, 65 (1979). "[T]he question at bottom is upon whom the loss ... should fall." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

The NAHB's interest lies in seeing that the law in this field remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with well-meaning government officials whose actions to achieve a public good may impinge on constitutional guarantees. As such, it is of paramount importance to the NAHB that property owners maintain the same access to federal courts to enforce their Fifth Amendment rights as they would to enforce a violation of any other part of the United States Constitution.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

Access to federal courts to enforce Fifth Amendment rights is the primary issue presented in this case. Relying on this Court's decision in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), federal courts have erected barriers to plaintiffs seeking to enforce their Fifth Amendment rights in that forum, requiring that these plaintiffs litigate the matter first in state court. These barriers are contrary to the clear mandate of the United States Constitution, as well as an Act of Congress.[3] Furthermore, these barriers make it increasingly, and unreasonably, difficult for citizens to seek redress of Fifth Amendment violations. This Court's intervention is necessary to correct this situation and to reinstate access to the federal judiciary for the enforcement of the Fifth Amendment.

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[3] 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

A. THE SECOND PRONG OF THE "RIPENESS DOCTRINE" CONFLICTS WITH THE CONSTITUTION, AS WELL AS CONGRESSIONAL AUTHORITY TO ESTABLISH FEDERAL COURTS' JURISDICTION

1. The "Ripeness Doctrine" Disregards Federal Jurisdiction

Federal courts are courts of limited jurisdiction; limited--indeed, established--by the Constitution, as well as Acts of Congress.[4] "The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."[5] Similarly, it necessarily follows that where the Constitution or an Act of Congress requires the exercise of federal jurisdiction, that mandate also can "be neither disregarded nor evaded." Yet, beginning with

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[4] See Owen Equipment and Erection Co. v. Kroger, 437 U.S. 365, 371-72 (1978)(citing Palmore v. United States, 411 U.S. 389, 401 (1972); Lockerty v. Phillips, 319 U.S. 182, 187 (1943); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922); Cary v. Curtis, 3 How. 236, 245 (1845)). See also United States Constitution, Article III, Section 2.

[5] Owen Equipment and Erection Co. v. Kroger, 437 U.S. at 374 (emphasis added).

this Court's decision in Williamson County,[6] the latter is exactly how the law concerning the pursuit of federal Fifth Amendment claims has evolved in the federal courts, as plainly evidenced in this case.

The Court in Williamson County established a two prong "ripeness doctrine" for determining when federal courts could assert subject matter jurisdiction over Fifth Amendment claims involving alleged regulatory "takings". A claimant must first obtain a final decision regarding the application of the regulations to the subject property. Then, the claimant must seek compensation through state procedures, including litigation in state courts. Williamson County, 473 U.S. at 186, 194 & 196-97.

The practical effect of the second prong of the "ripeness doctrine" which forces property owners to "seek compensation through [state] procedures", 473 U.S. at 194, including bringing an inverse condemnation action,[7] is that the enforcement of federal Fifth Amendment claims has been delegated to the state courts. This delegation is without either Constitutional or Congressional authority. And, in this case, as well as in many others, this delegation deprives citizens of a federal forum in which to enforce their Fifth Amendment rights.

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[6] Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985).

[7] 473 U.S. at 196.

2. The Eleventh Circuit Refused To Enforce The Reahards' Fifth Amendment Rights

The United States Court of Appeals for the Eleventh Circuit reversed the magistrate judge's finding that Lee County had violated the Reahard's Fifth Amendment rights.[8] Relying on Williamson County, that court reasoned that since the Reahards could pursue their just compensation litigation in Florida state courts, there was no federal subject matter jurisdiction.[9] Circuit Judge Kravitch wrote:

> '[a]s a practical matter, Williamson precludes litigation of the merits of a just compensation claim in federal court unless the state declines to provide adequate procedures through which an aggrieved party might seek compensation.'

Reahard v. Lee County, 30 F.3d at 1417 (citation omitted).[10]

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[8] Reahard v. Lee County, 30 F.3d 1412 (11th Cir. 1994); Reahard v. Lee County, 978 F.2d 1212 (11th Cir. 1992).

[9] Reahard v. Lee County, 30 F.3d 1412, 1417-18 (11th Cir. 1994).

[10] It is important to note that this reasoning is not concerned with whether just compensation has been denied, but whether the state fails to provide a procedure for seeking just compensation. In other words, can a Fifth Amendment right be enforced in state court? The answer is obvious since state courts maintain concurrent jurisdiction over constitutional matters. The issue, however, is must Fifth Amendment rights be enforced in state courts. The answer

This passage reinforced the previous decision written by Circuit Judge Fay in the Addendum to the August 14, 1992 Opinion, Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992):

> Assuming that these claims could be satisfied through adequate state judicial procedures, the Reahards have not stated a ripe federal claim
>
> . . . .

Reahard v. Lee County, 978 F.2d 1212, 1213 (11th Cir. 1992). As argued below, these procedural pronouncements conflict squarely with the federal jurisdictional requirements mandated by the Constitution and by the Congress.

3. Federal Courts Must Hear Cases Brought To Enforce The Fifth Amendment's "Takings Clause"

The Constitution mandates that federal courts hear and consider cases arising under the Fifth Amendment. Article III, Section 2 provides that "[t]he judicial power shall extend to all cases, in law and in equity, arising under this Constitution. . . ." The Congress, consistent with this mandate, enacted 28 U.S.C. § 1331 which provides that

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to that query is clearly no, and it is upon that premise that this decision was wrongly decided and upon which this Court must review its Williamson County decision. The enforcement of Fifth Amendment rights is properly made by a federal court. See United States Constitution, Article III, Sec. 2; 28 U.S.C. § 1331.

"[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Based upon these provisions, there is no merit to the argument that a person asserting a cause of action based on a violation of a right secured by the United States Constitution must first resort to a state forum.[11] Yet that is exactly what the Eleventh Circuit--relying on Williamson County--held in this case.

The federal courts are currently deluged with cases claiming subject matter jurisdiction based upon allegations of violations of the First, Fourth, Eighth, and Fourteenth Amendments of the United States Constitution. There exists no requirement by any authority that claimants bringing causes of actions based upon these portions of the Constitution need first seek compensation in a state forum. When a prisoner alleges that he has been treated by a local sheriff with "cruel and unusual punishment", he is not told to first seek state remedies. The federal courts also do not turn away the Washington Post claiming a First Amendment violation, a homeowner seeking damages for unlawful search and seizure, or a young black girl seeking redress in the face of separate, but unequal school facilities. Yet, for unexplained reasons, the federal courts treat Fifth Amendment claims as unworthy of initial consideration, and have erected procedural roadblocks to litigating Fifth Amendment "takings" claims in the federal courts. This not only contravenes Constitutional and Congressional perogatives, it also defies common sense. As Chief Justice Rehnquist recently wrote:

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[11] Cf. Bell v. Hood, 327 U.S. 678 (1946).

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of poor relation in these comparable circumstances.

Dolan v. Tigard, 114 S.Ct. 2309, 2320 (1994).

B. THE ELEVENTH CIRCUIT'S DECISION ILLUSTRATES ONE OF THE MANY UNINTENDED CONSEQUENCES OF THE SECOND PRONG OF THE "RIPENESS DOCTRINE"

The current case clearly illustrates one of the several procedural traps created by the second prong of the "ripeness doctrine" enunciated in Williamson County. The Reahards initially brought this case in state court, alleging, inter alia, that Lee County violated their Fifth Amendment rights. Lee County then removed the action to the United States District Court for the Middle District of Florida pursuant to the provisions of 28 U.S.C. §§ 1441 and 1446, based upon the federal Fifth Amendment claims. Then, having lost twice at trial, Lee County raises on appeal, for the first time, the question of "ripeness".[12] In the meanwhile, the Reahards

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[12] It is outrageous that Lee County, having removed the action claiming federal subject matter jurisdiction, could now claim that there never was federal subject matter jurisdiction. Reahard, 30 F.3d at 1415. Unfortunately, this is not an isolated incident, but rather a common governmental tactic

have been seeking redress for the violation of their Fifth Amendment rights for over ten (10) years![13]

Another common "Catch--22" faced by Fifth Amendment plaintiffs are the problems of res judicata and collateral estoppel. If plaintiffs first seek just compensation in state court, they obviously must establish a "taking" as a prerequisite to obtaining just compensation as a remedy. The plaintiff, however, having then litigated these questions in state court and lost, would be forever foreclosed from seeking relief in the federal courts due to the doctrines of res judicata and collateral estoppel. Though the Eleventh Circuit claims to have solved this quandry in Jennings v. Caddo Parish School Bd., 531 F.2d 1331 (5th Cir.), cert. denied, 429 U.S. 897 (1976),[14], it defies logic to require that prior to allowing litigation in one forum, the same claim must be litigated in another forum with concurrent jurisdiction.[15] Moreover, neither Jennings nor Fields address the question of the clear Constitutional and Congressional jurisdictional mandate.

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used to harass, exhaust and defeat property owners trying to assert Fifth Amendment claims.

[13] It is an old and familiar adage that "justice delayed is justice denied."

[14] See also Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299, 1305-06 (11th Cir. 1992)(homeowners' federal takings claims held barred by res judicata).

[15] Especially since a determination of the same operative facts would be required to adjudicate both state and federal claims.

Finally, the second prong of the "ripeness doctrine" runs counter to the intent of the framers of the Constitution. There were two primary reasons for extending federal jurisdiction to cases arising under the Constitution. First, the framers thought that "the judicial power ought to be coextensive with the legislative and executive powers, in order to ensure uniformity of interpretation and operation of the Constitution. . . and the means of enforcing rights, duties, and remedies arising under them."[16] Second, there was concern about pressures being brought to bear upon state courts to rule adversely to litigants seeking to enforce federal rights. Alexander Hamilton wrote in The Federalist, No. 81:

> [T]he most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the states would be improper channels of the judicial authority of the Union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.[17]

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[16] See Joseph Story, A Familiar Exposition of the Constitution of the United States, § 308 (1840).

[17] Professor Story likewise questioned the ability of state courts to rule objectively on matters involving allegations that their sovereign violated the federal law. "No man of sense will believe, that such prohibitions [on the states] would be

The second prong of the "ripeness doctrine" denies Fifth Amendment plaintiffs of the right to have their federal claims enforced in federal forums as envisioned by the framers of the Constitution. Furthermore, even assuming the most objective state forum, there is no compelling reason to consign a plaintiff to seek vindication of a federal right from the forum established by the sovereign entity alleged to have deprived him of that right.

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scrupulously regarded, without some effectual power in the [federal] Government to restrain, or correct infractions of them." A Familiar Exposition of the Constitution of the United States, §312.

CONCLUSION

Access to the federal courts is vital to ensure the protection of federal constitutional rights. This Court should act to provide the same access for plaintiffs asserting violations of the Fifth Amendment that is accorded plaintiffs seeking to enforce other portions of the Constitution. Accordingly, for the reasons stated above and in the Petition for Certiorari, the NAHB prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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No. 94-1384

In the

Supreme Court of the United States

October Term, 1994

RICHARD REAHARD and ANN P. REAHARD,
Petitioners,

v.

LEE COUNTY, FLORIDA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000

supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has participated as amicus curiae in this case in the court below, and attorneys for PLF have participated in numerous land use takings cases before this Court and other courts representing both amici curiae and property owner parties. For example, PLF attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF has participated as amicus curiae in other takings cases before this Court such as *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992); *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153 (1992); *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience in support of property rights will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Rule 37.3, written permission from all parties to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In November, 1984, upon the death of his mother, petitioner Richard Reahard inherited a 40 acre tract of land in Lee County, Florida. For over two decades this land had been zoned for subdivision into single-family residences, and would have accommodated 126 homes under the allowable density. Petition for Writ of Certiorari (Petition), dated February 16, 1995, at 10. The next month, Lee County's Comprehensive Land Use Plan (Lee Plan) became effective, *Reahard v. Lee County*, 30 F.3d 1412, 1413 (11th Cir. 1994) (*Reahard III*). The Lee Plan designated petitioners' property (and only petitioners' property, as all surrounding lots had already been developed) as a resource protection area (RPA). Petition at 10. As an RPA, petitioners' land could only be used for a single residence or a "recreational, open space or conservation area." *Reahard III*, 30 F.3d at 1413.

In January, 1988, petitioners applied to the Lee County Board of Commissioners (Board) for an amendment to the Lee Plan upzoning their property, *Reahard III*, 30 F.3d at 1413, and were denied in January, 1989. *Reahard v. Lee County*, 968 F.2d 1131, 1133 (11th Cir. 1992) *(Reahard I)*. On September 1, 1989, petitioners pursued their remedies in Florida state court, filing a complaint that alleged that the Lee Plan's RPA classification resulted in a taking of their property without payment of just compensation in violation of the Florida and United States Constitutions. *Reahard III*, 30 F.3d at 1414. Respondent filed an answer alleging, *inter alia*, that the claim was not ripe, and then removed the case to the United States District Court for the Middle District of Florida. *Reahard I*, 968 F.2d at 1133.

While the case was pending in federal court, petitioners sought an "administrative interpretation" of the Lee Plan by the Board to allow greater use of the property than allowed

as an RPA, but were denied by the Board on September 19, 1990. *Reahard III*, 30 F.3d at 1416. In November, 1990, the United States magistrate judge presided over a three-day bench trial on the issue of liability for a taking. On January 16, 1991, he issued an order determining that petitioners' property was taken without payment of just compensation. *Reahard I*, 968 F.2d at 1133-34. The issue of damages went before a jury on May 7, 1991, which returned a $700,000 verdict for petitioners, plus interest.

The Eleventh Circuit reversed this judgment on appeal, remanding to the trial court with instructions to reconsider the takings legal analysis and to render more detailed findings of fact. *Reahard* I, 968 F.2d at 1136-37. Nearly four months later, the Court of Appeals issued an "Addendum" to this opinion, further instructing the magistrate judge to consider whether the ripeness requirements of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. at 194, were satisfied. *Reahard v. Lee County*, 978 F.2d 1212, 1213-14 (11th Cir. 1992) (*Reahard II*). On remand, the District Court reinstated the judgment, and this was again appealed. The Eleventh Circuit reversed the District Court, *Reahard III*, 30 F.3d at 1418, finding a lack of federal jurisdiction because the takings claim under the United States Constitution had not yet ripened: "[U]ntil [petitioners] have pursued their state remedy, the federal courts are without subject matter jurisdiction." (Footnote omitted.) Thus, even though petitioners pursued their state remedy by filing their complaint in state court, and the state government defendant chose to remove the case to the federal court, the property owners' five-year old litigation that resulted in a $700,000 judgment in the forum of respondent's choice was thrown out the window. *Williamson County* does not and cannot require such a result.

SUMMARY OF ARGUMENT

This Court should grant the petition for writ of certiorari to clarify the meaning of *Williamson County*'s second ripeness factor for regulatory takings. Because the Fifth Amendment does not block government from appropriating property, but instead requires that just compensation be paid when this is done, the *Williamson County* Court was of the belief that, to ripen a federal takings claim, property owners must "seek compensation through the procedures the State has provided for doing so," 473 U.S. at 194, and be denied compensation.

It is not clear whether this requires that the pursuit of state law remedies be in state court. But even assuming that it does, this ripeness factor was satisfied when the petitioners filed their complaint in state court seeking compensation under both the state and federal Constitutions. By removing the case to the federal District Court, the government defendant denied the property owners compensation in the state forum just as assuredly as if the government had prevailed on the merits. Thus, the case turns on whether removal was proper.

Removal was proper if the federal claim existed in the state court proceeding. Under the Eleventh Circuit's reading of *Williamson County*, the federal claim ripens only upon final denial of compensation under state law, after all appeals are exhausted. But this conflicts with the typical approach of state courts, which is to decide takings claims under state *and* federal law simultaneously. The Eleventh Circuit's decision requires one to accept the concept that a federal constitutional claim can, at the same time, be ripe for review in state courts but not in federal courts--a decision

which exposes property owners to the risk that state court res judicata principles will bar subsequent litigation of the federal claim even if the claim is not raised in state court. Thus, the ultimate issue is whether a fundamental federal right, guaranteed by the Fifth Amendment, can ever be decided by a federal court.

Even if property owners can preserve the federal claim to be decided by a federal court, the Eleventh Circuit decision requires a redundant, inefficient, and absurd procedure. The property owners are to return to the forum they originally selected to retry the matter. If the state court denies them compensation, then they have a ripe action to bring back into the federal court--which has once before determined that the government must pay compensation in excess of $700,000. Assuming the prior District Court decision was right as a matter of law, this extra step makes no difference to the government entity, which will ultimately pay. But it does matter to property owners, who may lack the resources to try cases in two separate courts and would prefer the option to bring both state and federal claims at the same time.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

FILING A TAKINGS CLAIM UNDER STATE LAW IN STATE COURT SATISFIES WILLIAMSON COUNTY'S RIPENESS REQUIREMENT

In *Williamson County*, 473 U.S. at 192-95, this Court adopted two concepts of ripeness for use in cases brought

against state and local governments that allege that regulations as applied to a particular property violate the owner's Fifth Amendment rights to just compensation (as applied to the states through the Fourteenth Amendment). First, there must have been a final determination by the state decision maker on the uses that the regulations will allow for the property owner's land. *Id.* at 186. Second, since property may be taken provided that just compensation is paid, the property owner must first pursue compensation through available state remedies and be denied in order to have a claim that property was indeed taken without payment of just compensation. *Id.* at 195.

The Eleventh Circuit's ruling in this case clearly conflicts with *Williamson County*, which held, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County*, 473 U.S. at 195.

This Court has not yet determined whether this second ripeness requirement is satisfied when a property owner pursues state law remedies in a federal court. But without question, petitioners did submit their state law takings claim to a state trial court for determination along with their federal takings claim. *Reahard III*, 30 F.3d at 1414. They were not successful in receiving just compensation in the state court proceedings--because respondent elected to remove the case to federal court. *Id.* Respondent at once deprived petitioners of the chance to receive just compensation through state court procedures and deprived themselves of the "home court advantage" that *Williamson County* encourages.

Under *Williamson County*, if a state does not provide a means by which compensation can be sought, then a federal

takings claim can be brought directly in federal court. 473 U.S. at 197. The converse is not true, and the mere availability of a state law remedy does not prevent property owners from subsequently filing federal takings claims in federal court after compensation is denied under state law. *Williamson County* stated this clearly: "Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and *until it has utilized that procedure, its taking claim is premature.*" 473 U.S. at 196-97 (emphasis added). This does not mean, however, that the federal takings claim cannot be brought concurrently with the state claim in state court. Nothing in *Williamson County* would preclude a state court from deciding both claims simultaneously. In fact, this appears to be the standard procedure. *See, e.g., McFillan v. Berkeley County Planning Commission*, 438 S.E.2d 801, 809 (W. Va. 1993); *D'Addario v. Planning and Zoning Commission of the Town of Darien*, 593 A.2d 511, 513 (Conn. App. Ct. 1991); *Buskey v. Town of Hanover*, 577 A.2d 406, 408-09 (N.H. 1990); *Van Sickle v. Boyes*, 797 P.2d 1267, 1271 (Colo. 1990). This is exactly what the Reahards sought to do.

The Eleventh Circuit's decision that no federal claim was present to provide it subject matter jurisdiction over the case, *Reahard III*, 30 F.3d at 1418, means that the federal claim does not ripen upon the filing of a state takings claim, but only upon the final denial (after appellate activity) of compensation under state law in state court. This approach was rejected by this Court in its review of *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d 798, in which the federal and state takings claims were brought concurrently in state court. *See Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 902 (1991) (Harwell, J., dissenting). If the federal claim did not ripen until the South Carolina Supreme Court denied compensation, then this Court could not have

heard the matter, as it was brought on writ of certiorari and not under original jurisdiction. *Lucas*, 120 L. Ed. 2d at 809.

That many property owners, forced into state court by *Williamson County*, choose to litigate federal claims at the same time is understandable. Although to many property owners the right to have federal claims reviewed in a federal court is inalienable, to others the high cost of litigation in terms both of time and money lead them to accept the idea of a single state forum for efficiency's sake. Allowing for both state and federal takings claims to be tried together is sensible from the perspective of the state courts, too. Since these courts will want to construe their own constitutions and statutes in a way to avoid violating the United States Constitution, federal questions may well find their way into the state cases even if federal causes of action are not litigated. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 313 n.8 (although complaint raised only state takings claim, validity of state rule on compensation was considered under federal Constitution).

Williamson County, properly read, is satisfied when property owners seek compensation under state takings law in state court. They should have the option of reserving their federal takings claims for determination in federal court, after the state case has run its course, if they fail to receive just compensation in state court. *See Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299, 1306 (11th Cir. 1992). Another option would be to litigate the federal claims in the state court proceeding. This concurrent approach provides the state government defendant with an option of its own: whether to remain in state court or immediately remove the case to federal court. Respondent below chose the latter.

Unless this Court grants the petition for writ of certiorari and settles the matter, this issue will continue to vex property owners and governmental entitites. The former will not know if they should include the federal claim in state court filings and the latter will not know if removal is proper. Removal to federal court was attempted in one case amicus is currently litigating in the State of Washington, *Pang v. City of Seattle*, No. C95-308R (W.D. Wash.), as well as in Mrs. Dolan's lawsuit filed in the Oregon trial court seeking compensation for the exaction reviewed by this Court in *Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304 (1994); No. 95-96AS (D. Or.). If the property owners in such cases move unsuccessfully for remand (back to the state court), they risk going through a federal trial for naught if the Court of Appeals treats them as the Eleventh Circuit did the Reahards. But to avoid removal by reserving the federal claims (if such an act is recognized in that federal circuit) forces the property owners involuntarily to split their cases into two different courts. Their lack of financial resources to litigate the case in more than one forum might have been the reason for choosing to file both types of claims in state court, rendering them particularly vulnerable to such a running up of time and resources.

The case below is a good example of the dangers these citizens face. After five years of litigation, the Reahards would find themselves back at square one, in a trial court for another determination of the facts and application of the law. If they receive just compensation under state law in the state courts, then there has been no taking under federal law, but the respondent pays nevertheless. If they fail to receive compensation in the state courts, this is a Pyrrhic victory for respondent because the federal cause of action is then ripe for litigation in federal court (which found $700,000 in liability

the last time).[1] Thus, unless the facts are determined totally at odds with those already adduced in the district court, the ultimate result will be a finding of respondent's liability no matter which Constitution requires it. But petitioners may not have the resources to continue that far, in terms of dollars, time, or even emotional strength. Such a roundabout, duplicative procedure cannot be what was envisioned by *Williamson County*.

II

FAILURE TO CONSIDER A FEDERAL TAKINGS CLAIM RIPE WHEN JOINED WITH A STATE TAKINGS CLAIM IN A STATE COURT PROCEEDING RESULTS IN CIRCUIT CONFLICTS AND PROCEDURAL CHAOS

The Eleventh Circuit has determined that the joining of a takings claim under federal law with a takings claim under state law does not ripen the federal claim either upon filing in state court or upon removal to federal court. As explained above, this view requires property owners to go through two complete cases litigated in two different court systems in

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[1] In the takings context, the Fourteenth Amendment's Due Process Clause (and thus the Fifth Amendment) is not satisfied by a state's mere provision for procedures in which to seek compensation. This Court has always held, from the very beginning of Fourteenth Amendment takings jurisprudence, that the process that is due when property is appropriated is a process that *results* in receipt of just compensation. *See Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 234-41 (1897). Thus, it is the failure to receive just compensation, not the lack of a process in which to pursue it, which constitutes the violation.

order to have their rights under the United States Constitution determined.

This approach provides little comfort to property owners lacking the resources to litigate two separate cases, but at least reassures property owners who want a federal forum for their federal claims. This reassurance is predicated on the Eleventh Circuit's opinion in *Fields*, 953 F.2d at 1306-07, which adopted for takings cases the procedure created by this Court in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421 (1964). *England* provides to parties, forced to litigate their cases involuntarily in state court due to a stay of federal court proceedings, a mechanism for preserving their federal claims for a federal forum: an explicit statement on the record in the state court reserving the federal issues for federal court determination. *England*, 375 U.S. at 421. In *Fields*, the Eleventh Circuit recognized that *Williamson County* might similarly force parties involuntarily into state court, and that an *England*-type reservation is warranted. 953 F.2d at 1306.

If other Circuit Courts are to follow the Eleventh Circuit in holding that federal takings claims are not ripe for federal court review until state judicial proceedings determining state takings claims have been completed, then a *Fields* reservation must be allowed to enable the property owners to litigate their federal constitutional rights in federal court. Provided that a "full and fair opportunity" to litigate the facts of the case is provided in state court (*Allen v. McCurry*, 449 U.S. 90, 95 (1980)), the collateral estoppel

effect of the factual determinations is of little concern.[2] But the interpretation of rights under the United States Constitution should not be kept from United States courts. As the *Fields* decision noted:

> Indeed, it would be a very odd result if the federal courts were effectively barred from hearing claims arising under the takings clause, except through Supreme Court review via the writ of certiorari, of state court decisions interpreting the clause. ... [T]he question is whether the citizens of this country are to be barred from ever vindicating a federal constitutional right through the federal court system.

Fields, 953 F.2d at 1307 n.8.

Other circuits, however, have indicated that they might reject the concept of a *Fields* reservation. The Ninth Circuit, in *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359, 362 (9th Cir. 1993), refused to recognize a reservation that was filed in state court over one year after the state complaint, which included federal claims, was filed. The Ninth Circuit affirmed the dismissal of the federal case on *Younger* abstention grounds (*see Younger v. Harris*, 401 U.S. 37 (1971)), and quoted dictum stating that a reservation of federal claims cannot be made when a federal

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[2] At least one court has determined that a takings claim cannot be limited to review of an administrative record due to procedural inadequacies of the agency hearing process. *Healing v. California Coastal Commission*, 22 Cal. App. 4th 1158, 1178 (1994). If other states have similarly inadequate hearings, the record from those hearings cannot be the basis for state court factual determinations.

case was dismissed under *Younger*. 989 F.2d at 362. *See also Peduto v. City of North Wildwood*, 878 F.2d 725, 729 n.5 (3d Cir. 1989) (dictum indicating *England* reservation does not apply if state case is filed first). This is significant, for the pendency of a state action prompted the abstention in a federal case that included a substantive due process claim that was not included in the state action. *See Mission Oaks Mobile Home Park v. City of Hollister*, 788 F. Supp. 1117, 1119 (N.D. Cal. 1992). *Mission Oaks* implies that property owners possessing federal claims in addition to takings claims (such as due process or equal protection claims) cannot litigate these in a federal forum if they choose to ripen their takings claim in state court.

Even worse, the Ninth Circuit has also held that res judicata can bar property owners from litigating federal takings claims in federal court after unsuccessfully pursuing state takings claims in state court, because the federal claims "could have been asserted" in the state proceeding. *Palomar Mobilehome Park Association v. City of San Marcos*, 989 F.2d 362, 365 (9th Cir. 1993); *but see Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993). *Palomar* appears to be based on a contrary interpretation of *Williamson County* than that of the court below, the Ninth Circuit finding *Williamson County* satisfied when a "plaintiff take[s] its takings claim to state court," *Palomar*, 989 F.2d at 364, rather than upon completion of state judicial proceedings.

Palomar, however, flatly contradicts *Williamson County* by stating, "[w]hile every litigant deserves his or her day in court, few deserve two." 989 F.2d at 365. The point of *Williamson County* was not that property owners "deserve" to have a second day in court, but that they should be burdened with the "first day" in court by first seeking compensation through state remedies. Although the plaintiff

in *Palomar* did not assert its federal claims in the state proceeding, the Ninth Circuit found these to be extinguished by termination of the state proceeding. *Id.* Incredibly, it cited as support the *Peduto* case, in which the federal claims *were expressly litigated* in state court, *see Peduto*, 878 F.2d at 726-27, and *Fields*, which rejected the notion that property owners must be limited to a state court determination of their federal constitutional rights, *see Fields*, 953 F.2d at 1307 n.8. *Palomar*, 989 F.2d at 364-65. The *Reahard III* approach to ripeness, and the *Fields* approach to the right of a federal forum, appears to be in direct conflict with the Ninth Circuit's *Palomar* decision.

The ripeness issue affects many more rights than the right to receive just compensation. The Circuits are split over whether the *Williamson County* requirement that property owners seek compensation under state law applies to related nontakings claims under the Fourteenth Amendment. At least three Circuits have held that it does, *see Gamble v. Eau Claire County*, 5 F.3d 285, 288 (7th Cir. 1993) (substantive due process); *J.B. Ranch, Inc. v. Grand County*, 958 F.2d 306, 309-10 (10th Cir. 1992) (procedural due process); *Bigelow v. Michigan Department of Natural Resources*, 970 F.2d 154, 158-60 (6th Cir. 1992) (equal protection and procedural due process), while one has held that it does not, *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1404-07 (9th Cir. 1989) (procedural and substantive due process). Thus, the ruling below may prevent property owners from litigating any federal rights in just one legal proceeding. To bring some order out of this chaos and help settle these conflicts, this Court should grant the petition for writ of certiorari.

CONCLUSION

Williamson County's requirement that property owners pursue state compensation remedies in order to ripen a federal takings claim is satisfied when the property owners file a complaint in state court under state law. The removal of such a complaint by the government defendant effectively deprives the property owners of compensation in the state forum, and places the determination of liability under both federal and state law in the hands of the federal courts. After the government has removed a takings case to federal court and then lost on the merits, it would be inefficient, counterproductive, and unfair to force the property owners to go through the entire proceeding again in the original forum they selected. The Eleventh Circuit's ripeness determination in this case contradicts *Williamson County*, and is also contrary to *Lucas* and numerous state court decisions allowing state and federal takings claims to be brought concurrently.

For these reasons, and to help solve a number of procedural uncertainties faced by property owners seeking to vindicate their federal constitutional rights, amicus respectfully requests that this Court grant the petition for certiorari.

DATED: March, 1995.

Respectfully submitted,

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